

Weis Markets, Inc. t/a Mr. Z's Food Mart and United Food and Commercial Workers Local 72. Cases 4-CA-23525, 4-CA-23775, and 4-CA-23880

June 12, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN
AND BRAME

On March 21, 1997, Administrative Law Judge George Alemán issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel filed a brief in support of the judge's decision; the Charging Party filed an answering brief to the Respondent's exceptions; the National Retail Federation (NRF) filed an amicus curiae brief in support of the Respondent; the General Counsel filed an answering brief to the Respondent's exceptions and the NRF's brief; and the Respondent filed a reply brief to the General Counsel's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,¹ and con-

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In footnote 5 of his decision, the judge questioned the validity of the R. Exh. 6, a letter dated November 16, 1994, because the letter in question cites a Board decision (*Big Y Foods*, 315 NLRB 1083 (1994)), which did not issue until December 21, 1994. In a motion to reopen the record, contested by the General Counsel, the Respondent seeks to introduce an earlier letter in which the Respondent claims the cite to *Big Y Foods* is clearly a reference to the judge's decision in that case, which issued on July 22, 1994. This evidence, according to the Respondent, would support its contention that the reference to *Big Y Foods* in the November 16 letter was also intended to be a reference to the judge's decision in *Big Y Foods*.

The evidence that the Respondent seeks to introduce relates to an allegation that the judge dismissed. No party has excepted to the dismissal. Thus, we do not rely on footnote 5 in reaching our decision in this case. We deny the Respondent's motion to reopen the record to introduce the earlier letter as it is not material to the case before us.

We grant the Respondent's uncontested motion to reopen the record to admit R. Exhs. 77, 78, and 79.

In adopting the judge's conclusion, in sec. III,B of his decision, that the Respondent unlawfully discharged Thomas Cahill, Member Brame relies on Cahill's credited statements and on the passage of time between the incident and the decision to terminate him, but not on the judge's finding that, even if Supervisor Adamsky's version of the statements were credited, Cahill's statements would still not constitute a threat.

In addition, Member Brame does not rely on the judge's alternative criticism, in sec. III,A,3,i of his decision, of some of the Re-

clusions,² and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, Weis Markets, Inc. t/a Mr. Z's Food Mart, Tunkhannock, Plains, and Scranton, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its stores in Tunkhannock, Plains, and Scranton, Pennsylvania, copies of the attached notice marked "Appendix."'⁵⁰ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of

spontaneous witnesses for volunteering testimony that Zuba did not make certain unlawful statements, and of its counsel for eliciting similar testimony from others through leading questions. Member Brame notes that these are the only methods of showing that a statement was *not* made.

Member Brame also does not rely on the judge's double inference, in sec. III,A,3,iv of his decision, that "Zuba's promise of a wage increase during the January 23, afternoon meeting may have been designed to remedy any harm his morning comments may have done to his antiunion message," or on the judge's speculative statement in footnote 44, involving the Respondent's counsel's examination of Vice President for Operations Edward Rakoskie.

² We note the judge's analysis in sec. III,A,1 of his decision, finding that the Respondent violated Sec. 8(a)(1) by prohibiting non-employee organizers from distributing leaflets in front of three of its stores and threatening to call and calling the police to evict them, is consistent with our decision in *Indio Grocery Outlet*, 323 NLRB 1138 (1997).

The judge concluded, in sec. III,A,3 of his decision, that Manager Zuba's January 23, 1995 statements to the Tunkhannock employees, including that the Union "could do nothing for them," implicitly and unlawfully conveyed the futility of selecting the Union as their representative. In adopting this finding, we emphasize, as did the judge, that these statements were contemporaneous with and linked to Zuba's unlawful threats to close the store and put employees out of work if they voted to unionize.

We hereby modify the judge's conclusion of law regarding the Respondent's unlawful filing of a criminal complaint against employee Cahill. Inasmuch as the filing of the complaint did not concern the "hire or tenure of employment or any term or condition of employment," we find that the Respondent's action violated Sec. 8(a)(1) of the Act, rather than Sec. 8(a)(3).

³ In accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997), we shall change the date in par. 2(e) of the judge's recommended Order from February 16, 1995 to January 23, 1995, the date of the first unfair labor practice.

business or closed the stores involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since January 23, 1995.”

Carmen Cialino, Esq., for the General Counsel.

Robert Lewis, Esq. (Jackson, Lewis, Schnitzler & Krupman), for the Respondent.

George Wiszynski, Esq. (Butsavage & Associates, P.C.), for the Charging Party.

DECISION*

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. Pursuant to charges, and amendments thereto, filed by United Food and Commercial Workers Local 72 (the Union) on various dates between February 16 and September 22, 1995,¹ the Regional Director for Region 4 of the National Labor Relations Board (the Board) issued a consolidated complaint in this case, which was subsequently amended on October 10, 1995, alleging that Weis Markets, Inc. t/a Mr. Z's Food Mart (the Respondent) had violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). The Respondent thereafter filed a timely answer to the amended Complaint denying the commission of any unfair labor practices. A hearing on the complaint allegations was held before me on consecutive days from January 30 to February 5, 1996, in Wilkes-Barre, Pennsylvania, during which all parties were afforded full opportunity to appear, to call and examine witnesses, to submit oral as well as written evidence, and to argue on the record.

On the basis of the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after considering briefs filed by the Respondent, the General Counsel, and the Charging Party, I make the following

Finding on the Sequestration Order

At the start of the hearing, the General Counsel moved to sequester all witnesses except for alleged discriminatee Thomas Cahill, who was to serve as his representative to assist him in the prosecution of the case. The Charging Party and Respondent did not object to the sequestration of witnesses. The Respondent, however, moved to have the exclusion apply also to Cahill while the General Counsel's witnesses were testifying, and that its own witnesses should be allowed to remain during the General Counsel's presentation of his case, citing as support therefor the Board's holding in *Unga Painting*, 237 NLRB 1306 (1978), and Rule 615 of the Federal Rules of Evidence.² The Respondent's motion was

denied and, except for allowing each party to have a representative present, all witnesses were ordered sequestered.

In its posthearing brief, the Respondent renews its argument that Cahill should have been sequestered and moves to have his entire testimony stricken, contending that Cahill's presence in the hearing room while other General Counsel witnesses testified tainted his testimony (R. Br. 89). The Respondent's argument is without merit. Cahill was the first witness to testify in this proceeding, and as such had no opportunity to hear what other General Counsel witnesses who followed him on the witness stand would have to say. His testimony therefore could not have been tainted by testimony he had not yet heard. The Respondent does not suggest, nor did I observe or perceive anything in Cahill's conduct or demeanor as he sat at the General Counsel's table, to indicate that Cahill's mere presence in the hearing room tainted the testimony of those General Counsel witnesses who succeeded him to the witness stand.³

The Respondent further argues that because Cahill “was a witness to testimony of General Counsel's other witnesses, [it] was prejudiced by the cumulative effect of the testimony and its inability to elicit contradictory testimony,” and that allowing Cahill to remain undermined a main purpose of the sequestration rule, e.g., to provide a cross-examiner an opportunity to test the truthfulness of a particular witness who does not know what to expect (R. Br. 89). To the extent it argues that the failure to exclude Cahill somehow deprived it of a fair opportunity to cross-examine Cahill or any other General Counsel witness, that argument is without merit. Cahill, as noted, was the first witness called to testify and following his direct examination, was subjected to extensive cross-examination by Respondent, as indeed were all of the witnesses called by the General Counsel. The Respondent does not explain how Cahill's presence in the hearing room affected its ability to cross-examine either Cahill himself or any other General Counsel witness. The Respondent's dissatisfaction with the answers it obtained during cross-examination of these witnesses, or its inability to elicit from them the responses it anticipated or preferred can hardly be attributed to Cahill's presence in the hearing room.

Finally, I see no connection, and the Respondent points to none, between what the Respondent suggests is the cumulative nature of the testimony provided by the various General Counsel witnesses and the fact that Cahill was not sequestered. Clearly, as an alleged discriminatee in this matter and having been the first called to testify, Cahill's testimony was essential and hardly cumulative. If its assertion is that the testimony of the other General Counsel witnesses who corroborated Cahill is cumulative, a claim I do not accept, I nevertheless remain at a loss to understand how the cumu-

*An erratum issued on March 21, 1997, to amend the decision to reflect that the Respondent's motion to correct the transcript was granted.

¹All dates are in 1995, unless otherwise indicated.

²Rule 615 states in relevant part that “At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion.”

³There was no indication, for example, that Cahill, through signs, facial expressions, or some other manner, provided assistance to the General Counsel's witnesses. See *Impact Industries*, 285 NLRB 5, 8-9 (1987). Further, allowing Cahill to remain in the hearing following his testimony was fully consistent with the model sequestration rule set forth in *Greyhound Lines*, 319 NLRB 554 (1995). Thus, in relevant part, the rule states that “[a]lleged discriminatees, including charging parties, may not remain in the hearing room when other witnesses on behalf of the General Counsel or the charging party are giving testimony as to events as to which the alleged discriminatees will be expected to testify.” (Emphasis added.) As Cahill had already testified, the above rule was not contravened.

lative nature of the testimony is relevant to the question of Cahill's sequestration. In any event, on the issue of the cumulativeness of testimony adduced at the hearing, I note that the number of witnesses called by Respondent to refute Cahill's testimony far exceeded that used by the General Counsel in support of Cahill's testimony. In summary, assuming arguendo that the failure to exclude Cahill was somehow improper under *Unga Painting*, the Respondent has not shown that it was in any way prejudiced by the failure to do so. *Boilermakers (Triple A South)*, 239 NLRB 504 fn. 1 (1978); *Impact Industries*, supra. Finally, I find no support in the language of Rule 615 of the Federal Rules of Evidence or Board law for the proposition that a general sequestration order should not apply to the witnesses of one side while witnesses for the other side are testifying.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Pennsylvania corporation with its main office in Stroudsburg, Pennsylvania, is engaged in the retail sale of food and other items at stores located throughout Pennsylvania, New York, Maryland, Virginia, and West Virginia. Of the various stores found within the Commonwealth of Pennsylvania, one is located in the Village Center Shopping Center in Tunkhannock, Pennsylvania (the Tunkhannock store), another on River Road, in Plains, Pennsylvania (the Plains store), and one on Washington Avenue in Scranton, Pennsylvania (the Scranton store). During the past calendar year, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000, and purchased and received at its Pennsylvania stores goods valued in excess of \$50,000 directly from points and places located outside the Commonwealth of Pennsylvania. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Allegations

The complaint as amended alleges that the Respondent violated Section 8(a)(1) of the Act by:

(1) Threatening to close its stores, discontinue plans to expand, and eliminate jobs if employees were to choose the Union as their bargaining representative; telling employees it would be futile to support the Union because it could do nothing for them, promising them a raise in order to dissuade them from supporting the Union; and telling Cahill he should resign and go on welfare (see G.C. Exh. 1[y]).⁴

⁴ G.C. Exh. 1[y] amended the consolidated complaint by, inter alia, substituting a new paragraph 5(b)(i-iv) which broadened par. 5 (b) of the initial complaint to include the allegations that the Respondent violated Sec. 8(a)(1) by telling employees it would be futile to support the Union (par. 5[b][ii]), urging an employee to resign (par. 5[b][iii]), and promising employees a raise to discourage their support for the Union (par. 5[b][iv]). A prehearing motion filed by Respondent with the Board seeking dismissal of the above allegations on grounds they are time-barred under Sec. 10(b) of the Act was deferred to me for initial consideration and resolution (see G.C. Exhs.

(2) Promulgating a no-solicitation rule prohibiting non-employee Union organizers from soliciting or distributing literature on the parking lots adjacent to its stores, and threatening to have them arrested and calling the police when they refused to do so.

(3) Threatening to reduce employee work hours in order to discourage employees from engaging in Union or other protected activity.

(4) Telling employees they cannot wear union buttons to work.

It is further alleged that the Respondent violated Section 8(a)(1), (3), and (4) of the Act by discharging employee Tom Cahill because of his support for the Union and for having given a sworn affidavit to the Board, and by filing a criminal complaint against him with the Pennsylvania State Police.

B. The Relevant Facts

The record reveals that in December 1992, Weis Markets purchased some 14 stores, including the Tunkhannock, Scranton, and Plains stores, from IGA Food Mart, Inc., previously owned and operated by Stanley Zuba, Respondent's current manager. As owner/operator of IGA Food Mart, Zuba had maintained an open policy regarding the solicitation and distribution by various nonprofit and charitable groups at his stores. Weis Markets, on the other hand, had long maintained a strict no-solicitation policy at its stores. Thus, with the sale of his stores and his assumption of the duties as Weis' general manager for Mr. Z's, Zuba was obligated to adhere to Weis' policy, including its no-solicitation rules. However, although Weis assumed control over the IGA stores in 1992, by the summer of 1994, Zuba had not implemented Weis' no solicitation/no distribution policy at the Tunkhannock, Scranton, and Plains stores. In fact, only after union literature and authorization cards began appearing at one of the stores in the summer of 1994 was implementation of Weis' no-solicitation policy raised for the first time with Zuba by Weis' labor counsel, Robert Lewis. According to Zuba, Lewis "strongly advised" him to change his open policy of allowing solicitation at his stores, and in a letter purportedly sent to him on November 16, 1994, explained how a supermarket chain in Michigan (Meijer) had been required by the Board

1[ff]; 1[ll]). The Respondent renewed its motion to dismiss in its posthearing brief. Having duly considered Respondent's motion in light of its prehearing supporting brief and an opposition brief filed by counsel for the General Counsel (G.C.Exh. 1[kk]), I find the Respondent's claim to be without merit. The 8(a)(1) allegations in question clearly meet the "closely related" test stated by the Board in *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988); see also, *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989). Said allegations, for example, involve the same section of the Act as the allegation contained in the charge filed in Case 4-CA-23525 on February 16 (see G.C. Exh.-1[a], par. 5), and grow out of the same factual situation, e.g., a January 23, mandatory employee meeting conducted by Respondent's manager, Zuba, during which he allegedly made the unlawful statements described in the charge and the amended complaint paragraph 5(b)(i-iv). Given these facts, and as the Respondent's defense to the allegation that it threatened to close the stores was similar to that asserted with respect to the allegations not contained in the original charge, I find that a sufficient nexus exists between the allegations in the initial charge and that contained in the October 10, amendments to the Complaint. *Hamilton Plastic Products*, 309 NLRB 678, 683 (1992). Accordingly, Respondent's motion to dismiss is denied.

to allow union picketing on its premises because of its practice of allowing solicitation by other groups (R. Exh. 6).⁵ Following discussions with Weis' president, Norman Rich, Zuba agreed to implement Weis' no-solicitation policy at the Mr. Z's stores. However, because of the approaching Christmas holidays, and because Zuba served as chairman of the board for the area chapter (Monroe County) of the Salvation Army, actual implementation of the no-solicitation policy was delayed until January 1995 so as to afford the Salvation Army a last opportunity to engage in fundraising at his stores during the holidays.

Respondent's general manager, Jeffrey Brown, testified that on January 3, he prepared cardboard signs that read, "SOLICITING IS NOT ALLOWED ON THESE PREMISES" which he immediately sent to all stores and which were posted either on January 3 or 4. Brown claims he personally called each store manager to explain the new policy,⁶ and instructed them that should they receive a request to solicit, they should direct the organization involved to address their request in writing or by phone to one Loretta Matthews, a secretary employed at Respondent's headquarters in Stroudsburg, Pennsylvania. According to Brown, the new policy was applicable to the stores, the sidewalk and parcel pickup areas adjacent to the stores, and the portion of the parking lot fronting the store. He admits that permission was never obtained from the owners or landlords of the shopping centers to restrict solicitation in the above areas, claiming that Respondent had a right to do so pursuant to a "property interest" arising from "our maintenance of the property and our liability for any problems which occur on that property." (Tr. 389.)⁷ On or about March 13, the Respondent posted

metal no-solicitation signs in the shopping center parking lots which read: "SOLICITATION, DISTRIBUTION OF LITERATURE OR TRESPASSING BY NON-EMPLOYEES ON THIS PARKING LOT IS PROHIBITED. MR. Z'S FOOD MART" and replaced the cardboard signs posted on January 3, with metal signs identical to the ones posted in the parking lots, except that the words "parking lot" were replaced with "premises."⁸

Cahill began working for Respondent as a third shift stock clerk at the Tunkhannock store on June 16, 1994. He testified, without contradiction, that sometime in the fall of 1994, during the change from daylight savings time to standard time, he and other employees who worked the extra hour as a result of the time change were told they would have to wait until the spring of 1995 to be compensated for the extra hour. Dissatisfied with Respondent's decision to withhold such payment, Cahill visited the Union's office on about November 3, 1994 and after speaking with Union Representative Michelle Kessler signed a card authorizing the Union to represent him for purposes of collective bargaining (G.C. Exh. 3). Cahill testified that about 2 months later, while in the employee breakroom, he told other employees that he had signed a card for the Union. He further testified, without contradiction, that Mark Adamsky, the Tunkhannock store assistant night manager, an admitted Section 2(11) supervisor, was seated at the table next to the employees when he informed them of his card signing. Cahill subsequently solicited Tunkhannock store employees Lou Burroughs, Tom Miller, and Sue Bonavita to sign authorization cards. He further testified, without contradiction, that soon thereafter Adamsky began referring to him as "Union boy" (Tr. 99). Miller likewise testified without contradiction that he often heard Tunkhannock assistant store manager, Richard Kern, an admitted Section 2(11) supervisor, as well as Adamsky, often refer to Cahill as "Mr. Union."

In early January, the Union began mailing literature and blank authorization cards to the homes of Respondent's employees describing its organization and soliciting their support (G.C. Exh. 4). Some of this literature wound up in the hands of the various store managers who turned it over to Brown. Brown, in turn, forwarded the union literature to Attorney Lewis who advised Respondent to begin a mailing campaign of its own. On January 14, the Respondent sent a letter to all employees, largely prepared by Lewis, referencing the authorization cards being sent to them by the Union and explaining, in question and answer form, why they should not sign cards (G.C. Exh. 5). Further, following con-

⁵ While dated November 16, 1994, R. Exh. 6 makes reference to a Board decision in *Big Y Foods*, 315 NLRB 1083 (1994), which issued on December 21, 1994, after Lewis purportedly mailed the letter to Zuba. The Respondent's failure to explain this inconsistency leads me to question the circumstances and the motivation surrounding the preparation of R. Exh. 6.

⁶ David Davis manages the Tunkhannock store, Robert Stefanko the Plains store, and Robert Stair the Scranton store.

⁷ Brown drew a distinction between Respondent's right of control over the sidewalk and parcel pickup areas, and its right over the parking lot. Thus, he testified that Respondent has a "property interest" in the sidewalk and pickup areas, but maintains only an "easement" right to the parking lot. The key distinction between the two, according to Brown, is that Respondent lacks the authority to exclude others, e.g., customers of other shopping center tenants, from the easement, but inferentially may do so with respect to those areas over which it retained a property interest. Despite Brown's attempt to portray himself as being sufficiently knowledgeable of Respondent's property rights and as having familiarity with such concepts as property interests and easements, I seriously doubt he is as knowledgeable as he made himself out to be. In this regard, I note that Brown claimed that the parking lot easement went only as far as "where the lines demarking the beginning parking field begin." When asked by the General Counsel if the drive-through area between the parking lot and the store's pickup area was part of Respondent's "property interest" or considered part of the "easement," Brown with some hesitancy labeled it a "cross easement." (Tr. 432; 600-602.) I found Brown's testimony in this regard unconvincing. From his demeanor, I was left with the impression that he was conjuring up these explanations as he went along. Nor, as will be noted infra, is this the only instance in which Brown's testimony can be called into question. Overall, Brown's testimony is found to be lacking in candor.

⁸ During cross-examination, Brown testified, somewhat incredibly in my view, that the parking lot sign was not really needed as the cardboard sign posted at the stores in January would have been sufficient to put the public-at-large on notice that the restriction on solicitation applied not only to the store itself but also to the common areas of the shopping center including the sidewalk, the parcel pickup area, and the parking lot. Brown's testimony in this regard simply makes no sense, and I sincerely doubt that he himself believed what he was saying. Clearly, if the cardboard no-solicitation sign placed on the store window in January could by some stretch of the imagination be construed as applying to all the common areas of the shopping center, then there would have been no need for Respondent to post the metal no-solicitation sign at the parking lot. While Brown explained that the purpose of putting up two distinct signs, one in the parking lot and the other in the store, was "so that there's absolutely no confusion with any layman," I place no credence on his explanation.

sultations with Lewis, Zuba decided to conduct mandatory employee meetings at all Mr. Z's stores beginning January 23, because as Zuba put it, he wanted to "stress our part of the case, to explain our situation and our position, of what would happen." (Tr. 231; 1023). One week prior to the meeting, Tunkhannock Store Manager Davis posted a notice near the employee timeclock informing employees that the mandatory meeting was to be held at 7 a.m. and 4 p.m., on January 23.

Cahill and approximately 20 other employees, including Burroughs, Miller, Bonavita, and employees Sherry Metz, John Swick, Stella Sands, and Shirley Dymond, attended the 7 a.m. meeting. In attendance for management were Zuba, Davis, Kern, Adamsky, Tunkhannock Assistant Store Manager Vito Rinaldi, and Night-Shift Foreman, John Balian. While there is no disputing that Zuba was the only individual to address the employees and that the Union was the focal point of the meeting, the General Counsel's and Respondent's witnesses disagree on exactly what Zuba said to employees at the 7 a.m. meeting. As to the 4 p.m. meeting held later that day, the evidence indicates that Zuba again was the sole speaker and that the subject matter likewise centered on the Union. The specifics of both meetings are more fully discussed *infra* in connection with my findings on the 8(a)(1) allegations.

Following the 7 a.m. meeting, Cahill went outside and began talking to union organizers John Chincola and Ken Corasic who were handing out literature to employees as they exited the store.⁹ According to Chincola, he and Corasic stationed themselves in the parking lot near the pickup area in front of the Tunkhannock store, some 10–15 feet from its entrance. Chincola testified that a short while later, Kern came outside, asked them if there was a problem, and when told there was none, went back inside the store. Cahill, however, testified that while he was outside talking to Chincola, he noticed Kern standing by the store window, that Kern then came outside and "told us that he would like all of us to leave the property," and that they refused to do so (Tr. 54). According to Cahill, Zuba appeared shortly thereafter and asked if the organizers were bothering him, to which Cahill responded they were not. Zuba then told Chincola and Corasic to leave or he would call the police. Except for hearing Zuba ask Cahill if the organizers were giving him any problems, Chincola agrees with Cahill that Zuba directed them to leave the property under threat of arrest. Zuba's account of this incident is that on observing Cahill talking to the organizers, he informed the latter not to bother Cahill and instructed them to leave the property. He claims that the organizers at this point were standing on the parking lot side of the ramp leading up to the sidewalk adjacent to the store (see R. Exh. 76). Despite some minor variances in their accounts, I credit a composite version of Cahill's and Chincola's testimony as to what occurred and find that Zuba inquired of Cahill if the organizers were bothering him, and that Zuba, as Kern had done moments earlier, ordered the organizers off the property under threat of arrest. I also credit Chincola that he and Corasic were not on the sidewalk but were instead leafleting on the parking lot near the parcel

pickup area of the store. It is undisputed that the organizers left shortly thereafter.

Later that afternoon at approximately 4:30 p.m., following a similar meeting at the Scranton store, Chincola began handing out leaflets to Scranton store employees from the parcel pickup area of the store's parking lot. Approximately 1 hour later, James Dohlon, the Scranton store's grocery manager, came out and told him he did not belong there, that he was on private property, and unless he left the police would be called. Chincola refused to do so, at which time on Dohlon's instructions the local police were called and arrived some 15 minutes later. Chincola testified, without contradiction, that Zuba arrived at about the same time as the police and said to him, "Charlie, I thought I told you this morning, get the hell out of here. You're trespassing. You're on private property, and I'm going to have you arrested." Chincola responded that his name was not "Charlie" but rather John Chincola. After looking at the union literature being distributed and checking Chincola's identification, the police officer told Chincola he could only leaflet at the shopping center's entrances and exits, but could not do so in front of the store. He warned that if Chincola persisted, he could be arrested. At that point, Chincola opted to leave.

On January 24, Chincola, on learning that a mandatory employee meeting was to be held that day at the Plains store, began leafleting employees as they entered and exited the store. He was accompanied this time by Kessler and Union President Thomas Lazur. While Chincola and Kessler stationed themselves at the parcel pickup area which abuts the sidewalk adjacent to the store, Lazur stood on the sidewalk itself.¹⁰ Soon thereafter, Plains' store manager Stefanko approached them and stated, "Get out of here, you're on private property; we're going to call the police." When Chincola, Kessler, and Lazur declined to leave, Stefanko directed a store clerk to call the police. A short while later, the Plains township chief of police appeared and asked Chincola what was going on, that he had received a call about a disturbance at the store. After some discussion the police officer took the organizers' names, addresses, and phone numbers, and then asked Stefanko and Dohlon if they were "aware of the NLRA." According to Stefanko, the police officer seemed annoyed at having been called, called the incident an insignificant event, told him he could not remove the union representatives from where they were, and left. Soon thereafter, Zuba appeared and ordered them to leave, stating that they were on private property, and threatened to call the police and have them arrested. Chincola credibly testified that while other employees were milling around, Zuba quipped, "what did the Union do for Giant, what did the Union do for Acme people; they are all out of jobs." Stefanko, who by now had reappeared, then asked Chincola why he did not get a job, to which Chincola replied, "I have a job, a real job, a Union job." The exchange ended at that point. Chincola claims that after this encounter, employees stopped taking literature from him and the other organizers.

On January 25, according to Kern, when he reported for work he found the store in a state of disarray, with cardboard strewn all over the aisles and the shelves not properly

⁹The organizers learned of the scheduled meeting from Kessler who had been informed by Cahill soon after notice of the meeting had been posted in the store.

¹⁰The record reflects that Chincola may have first entered the store to purchase a beverage. No contention has been made here that Chincola engaged in solicitation inside the Plains store.

stocked. That same day, he held a meeting in a backroom of the store to discuss the store's condition. At the meeting, he complained to employees that he was dissatisfied with their work, and further mentioned that the night shift was in need of additional checkers (or cashiers) due to some resignations. On the latter point, he made it clear to employees that the store did not have the budget to fill the two checker slots and that volunteers would be needed to perform the checking duties. Kern readily admits telling employees that if he could not obtain employees to volunteer to cross-train into the checker positions, he might have to reduce their work hours presumably to come up with the funds needed to hire two additional checkers. Kern further admits to having a conversation with Adamsky in the juice aisle in which he told Adamsky that "this crap has to stop" referring to the employees' slow pace. Adamsky confirmed Kern's testimony about having made the "crap" remark. On this same subject, employee Miller recalled being at a meeting, presumably the one alluded to by Kern, and to having heard Kern complain that the shelves had not been pulled properly, the freight hadn't been put up, and that "if we didn't start working harder, that he was going to hire more people and cut our hours." Cahill claims to have overheard the conversation between Kern and Adamsky in the juice aisle and that he heard Kern say, "if this crap doesn't stop, we're going to cut the hours and bring in our own guys." Cahill claims Miller was standing nearby, but did not hear the conversation between Kern and Adamsky, although he did not explain how he would know what Miller did or did not hear. Miller makes no reference to the Adamsky/Kern discussion in the juice aisle, and in fact it is not clear whether he was standing nearby as suggested by Cahill. By the same token, Miller could not recall if Cahill was present at the above-described employee meeting called by Kern, and Cahill was not asked if he attended any such meeting. He further claims that by the time Kern arrived to work on the morning of the meeting, all the new freight had been shelved and employees were working on shelving the old freight that was in the storeroom.

Beginning sometime in March and on instructions from Respondent's attorney Lewis, the Respondent, in response to the charges filed by the Union in February, directed the four Tunkhannock store managers (Davis, Kerns, Dudek, and Rinaldi) to maintain a daily log of any unusual events or activities occurring at the store (see G.C. Exh. 7, p. 8). Davis gave conflicting testimony as to what the log was to be used for. Thus, while testifying that the log was intended to record anything unusual that happened at the store, whether union related, he also testified that his instructions were to record any union activity taking place at the store. However, the fact that the log is labeled "Union Activity" and that the only entries contained therein appear to be Union related (including the March 29, incident that led to Cahill's eventual discharge), I am convinced that the sole purpose of the log was to keep a record of the employees' union activities at the store. My finding in this regard is supported by the fact that the "Union Activity" log makes no reference to other incidents that allegedly occurred sometime in March and which presumably would have been recorded if the log had a more general purpose (see fn. 12, *infra*).

Beginning sometime in April, Cahill began wearing a pronoun button to work (G.C. Exh. 6). The first day he wore

the button, Store Manager Davis asked him to remove it. When Cahill asked why, Davis responded that the store had a no-solicitation policy. Cahill responded that he was not soliciting and that every employee had a right to wear a union button. Davis then instructed him to remove the button until after the Respondent's attorneys were consulted. Cahill claims that the next day he was allowed to resume wearing the button, but that soon thereafter Dudek instructed him to remove it. Cahill explained to Dudek that Davis had approved his wearing of the button beginning that day. Dudek thereafter allowed Cahill to continue wearing the button, and no further incidents regarding the button occurred after that.

At around 4 a.m. on March 29, Cahill was performing his normal duties restocking shelves when he began a conversation with employee Burroughs who was also busy restocking shelves in the next aisle over. Cahill and Burroughs were separated by the tall shelf or gondola on which the grocery items are displayed. During this conversation, Cahill mentioned to Burroughs that his younger brother had obtained a book on how to make car bombs entitled, "THE POOR MAN'S JAMES BOND," told him he did not care for such books, and that it was ridiculous that such a book would be for sale. Cahill testified that Adamsky, who was at the other end of his aisle restocking shelves, could not have overheard what he said to Burroughs, and denies that Adamsky took part in his conversation with Burroughs, or spoke to him regarding his work or the substance of what he may have said to Burroughs. Burroughs essentially corroborated Cahill's account of their discussion of the car bomb book, testifying that there was no discussion regarding anything specific in the book, that Cahill expressed his objection to the book, and that Adamsky was not a participant in the conversation.¹¹

Adamsky provided a slightly different, and in my view, confusing an unconvincing version of what occurred on March 29. Adamsky agrees that Cahill and Burroughs were engaged in a conversation while stocking shelves, and that Burroughs was in the next aisle separated from Cahill by shelves. He claims that he too was stocking at the time and was only 4-1/2 feet from Cahill when he heard Cahill mention to Burroughs that he and his brother had gotten a book

¹¹ In its posthearing brief, the Respondent claims that it was error to deny his request to have "portions of the book" included as evidence (Tr. 905), because the book was needed to show that Cahill had in fact threatened Adamsky with a car bomb and had the ability to construct such a bomb and carry out the threat (R. Br. pp. 96-97). I note in this regard that Respondent sought to introduce the entire book, not mere portions of it, into evidence, and its assertion to the contrary is clearly without merit (see Tr. 79-80; 902; 903-905). Further, I declined to receive the book into evidence on relevancy grounds, as argued by the General Counsel and the Charging Party (Tr. 903-905), not because of the size of the book. However, ignoring my ruling that the book is not considered evidence in this proceeding, the Respondent in its posthearing brief has taken the liberty, in my view improperly so, of including portions of the rejected "bomb book" exhibit as part of an appendix to its brief, and cites to it in presenting its arguments (R. Br. 83, Appendix Exh. "S"). Respondent's counsel, Lewis, an experienced practitioner in the field of labor law, must certainly be aware of the impropriety of such conduct. I place no reliance and have not considered arguments based on that rejected exhibit, nor have I considered the various bomb-related newspaper articles included in the appendix (Exhs. T-Z) as they too have no bearing on the question of whether or not Cahill threatened Adamsky.

on car bombs. Adamsky testified that as Cahill and Burroughs continued talking, he went around the corner to the next aisle to see where Burroughs was standing, and then returned to Cahill's aisle and continued stocking shelves. On observing that Cahill was still talking with Burroughs, Adamsky purportedly told Cahill, "Tom, I put you here to work, you are gabbing like a politician." Under cross-examination, Adamsky changed his testimony claiming that he made his "politician" remark before overhearing Cahill tell Burroughs about the car bomb book. In his modified version, Adamsky purportedly heard Cahill make his remark about car bombs, and became very frightened because, according to Adamsky, Cahill was looking directly at him and seemed very mad. Adamsky claims he then asked Cahill if he was threatening him, and that Cahill did not respond but simply walked away with a mad look on his face. Adamsky testified that the following day, he reported this incident to Kern, and on March 31, reported it to Davis who recorded it in the "Union Activity" log (G.C. Exh. 7, p. 8). Kern, who testified in this matter, was not asked about and consequently did not confirm Adamsky's assertion that the latter reported the incident to him on March 30. Davis, on the other hand, agrees that Cahill informed him of the incident on March 31, and testified that he viewed Cahill's mere comment that "he had a book on car bombs" as "a very serious threat to Adamsky . . . because with the way things are today, I mean, you hear all this stuff going on, I mean, all these bombings and that, all these threats, I mean, that's serious." On or about April 4, Davis purportedly reported the incident to Brown. When asked if he considered separating Cahill from Adamsky in light of the alleged threat, Davis claims he did not consider it and in any event lacked independent authority to do so, and could only recommend to higher authority that such a personnel change be made. He admits, however, that he made so such recommendation to higher management. Given his position as the manager of the Tunkhannock store, Davis' claim that he lacked authority to transfer either Cahill or Adamsky to another shift, is simply beyond belief. Moreover, even if true, no explanation was proffered as to why Davis, who claims he viewed Cahill's remarks as a "very serious threat to Adamsky, did not seek permission from higher management to effectuate a change in the work assignments of either of these two individuals. The only reasonable inference that can be drawn is that the incident was not as serious as Davis would have one believe.

Following the March 29, incident, Cahill, as noted, continued working alongside Adamsky without further incident, and the issue of the car bomb comment was never discussed with Cahill or Burroughs, or for that matter raised again until April 29, when Cahill was discharged. Regarding the discharge, Brown testified that on April 27, he met with Zuba, Attorney Lewis, Respondent's president (Mr. Rich), its vice president for operations Ed Rakowski, and Mike Ream, the former and since retired operations vice president. According to Brown, the purpose of the meeting was to discuss what to do about the "threats and the vandalism that was occurring in the store." (Tr. 542.) The threat alluded to was the comment Adamsky claims was directed at him by Cahill on March 29, and the alleged acts of vandalism pertained to in-

cidents purportedly reported by employee Sands.¹² Brown testified that Cahill's remark was of paramount concern to Respondent because it occurred just a few weeks after the bombing of the federal building at Oklahoma City, and because of the potential liability that would be imposed on Respondent should a bomb threat be carried out. Brown claims that on Lewis' advice, he agreed that both would meet with Adamsky to "affirm the situation," and that if Adamsky were to confirm the March 29, incident, the Respondent "would have grounds for taking action" against Cahill (Tr. 544). On April 28, Brown met with Adamsky who "affirmed . . . what he had reported before" regarding Cahill's alleged threatening remark. Brown testified that he asked Adamsky whether he wanted to report the matter to the proper authorities, and that the latter agreed to do so, but asked that Zuba and Respondent's Director of Security, Theodore Poltruck, accompany him. Adamsky's version, however, reflects that Brown did not simply ask whether he wanted to report the matter to the police but rather "told me that I should report this to protect myself." (Tr. 1021.)

On April 29, Brown and Rinaldi met with Cahill. According to Brown, who had never met Cahill, he introduced himself to Cahill, informed him that Adamsky had reported that he (Cahill) "had a book on car bombs and that he had gotten that book on car bombs, and that Adamsky had taken this as a threat." (Tr. 546.) Brown claims Cahill admitted having received the book in the mail, that he and Burroughs discussed the book on March 29, but that it was not intended as a threat. Cahill mentioned to Brown that Adamsky could not have heard him as he was at the other end of the aisle.

¹² The incidents in question involved reports by employee Sands that sometime in March, she found a sexually suggestive display in the produce department where she worked, found puncture marks on the tires of her car, and found the temperature thermostat on a produce wrapper heat unit turned up all the way, which potentially could have started a fire in the store, along with a destroyed roll of plastic film used with the unit to wrap the produce. Sands claims that these incidents were reported in March to Davis, Rinaldi, and Produce Manager John Weron. These incidents were not recorded in the "Union Activity" log which Respondent claims was to be used to report incidents of an unusual nature. Other incidents alluded to by Brown included loosened tire lugnuts discovered on Rinaldi's car, and writing on a bathroom stall reading, "John, the next time the dent is in your head, not in your car." According to Brown, Produce Manager Weron purportedly told him he had discovered a dent on his (Weron's) car, and that the comment on the bathroom stall was a reference to the dent in the car. Regarding the latter two incidents, Rinaldi, who testified at the hearing, was not questioned about the lugnut incident and consequently did not confirm Brown's testimony that such an incident occurred (Tr. 538-542). Weron was not called as a witness in this matter, and Brown's testimony regarding the Weron incident amounts to nothing more than unsubstantiated hearsay. As to the remaining incidents testified to by Sands, I am not thoroughly convinced that such incidents occurred. Thus, while she claims she reported these incidents to Davis, Rinaldi, and Weron, the former two, both of whom testified, were not asked to confirm Sands' testimony in this regard, and Weron, as noted, was not called to testify. Nor is there any evidence to suggest that if these incidents did in fact occur, they were ever investigated by Respondent. Indeed, even if I were to accept as true Brown's assertion that these incidents in fact took place, his testimony suggests that these incidents first became a subject of discussion only when Respondent was purportedly deciding how to handle the alleged Cahill-Adamsky incident.

Brown claims he then asked that if this was so, “why did Mark ask you if this was a threat?,” and that Cahill simply declined to answer. Brown’s testimony does not reflect any admission by Cahill that he and Adamsky engaged in any such conversation on March 29. Brown purportedly decided to discharge Cahill at that point because he “admitted to me that he had made those statements about making a car bomb, about having a book on making car bombs, and on what Adamsky had told me and the fact that Adamsky felt fear, he was scared and so on and so forth.” (Tr. 547.) According to Brown, given the recent Oklahoma City bombing, he took such matters very seriously. He then instructed Cahill to punch out and leave the store. Brown did recall hearing Cahill protest that having such a book was part of his free speech rights, but denied that Cahill criticized or expressed opposition to the book.

Cahill’s version of this meeting is slightly different. He claims that on April 29, Brown and Rinaldi met him in the lobby of the store, and that Brown told him that he was being terminated because he had threatened an employee about a month earlier. When Cahill asked what threat he was alleged to have made, Brown mentioned that Adamsky had overheard Cahill discussing the bomb book with another employee, and that when Adamsky came over to ask Cahill if he was threatening him (Adamsky), Cahill had not responded and simply walked away. Cahill explained to Brown that the incident as described by Adamsky had never happened, and while admitting he and another coworker had talked about the car bomb book, Adamsky was not the subject of or took part in the conversation. According to Cahill, Brown told him that “in lieu of the Oklahoma bombing, that such a tragedy like this happened, we don’t want it to happen to our store and our employees here.” Brown again repeated that Cahill was being terminated and was told he was no longer allowed in any of Respondent’s stores. Rinaldi, according to Cahill, remained only 4 or 5 feet away during this entire conversation (Tr. 67–69).

On May 1, Adamsky, accompanied by Zuba and Poltruck, went to the Tunkhannock state police barracks to report Cahill’s alleged bomb threat. A complaint was thereafter filed with state trooper Thomas Jordan accusing Cahill of having made a “terroristic threat” toward Adamsky (G.C. Exh. 7). Trooper Filarsky testified he took over the investigation after the initial report was prepared by Jordan,¹³ and continued the investigation by interviewing Cahill and Burroughs and obtaining an affidavit from the Union’s attorney stating its view on the matter. After reviewing all the information, Filarsky concluded there was no evidence to show that Cahill had threatened Adamsky in any manner, or that a crime had been committed. In concluding that no threat had been made, Filarsky took into account Adamsky’s admission in the incident report that “he didn’t know if he was threatened or not,” the fact that Cahill and Adamsky continued working side by side following the March 29 incident, and the fact that Respondent waited 30 days before reporting the matter to the state police. For these reasons, as well as a lack of evidence to support the criminal charge filed against Cahill, Filarsky concluded that the entire complaint

was “unfounded,” noting that the decision from his point of view was a fairly easy one to make (Tr. 140).

Adamsky testified that following Cahill’s discharge, he continued to be harassed and threatened presumably by other employees. Adamsky, for example, testified to several incidents all of which he claims made him fear for his physical safety. Thus, he claims that on May 12, he found the phrase “stupid employees must go” written on a sign posted in the men’s room, and came across a sign in the employee breakroom on which was placed an article from “The Citizens Voice,” a local newspaper, over which someone had written “You’ll pay for your lies” with Adamsky’s name written above it. Adamsky claims Shift Foreman Balian also saw the newspaper article, and that he (Adamsky) reported these incidents, although he did not explain to whom, because he was convinced someone wanted him out of the store. Balian did not testify in this proceeding. Adamsky claims to have found another threatening message involving an article from the “New Age Examiner” which discussed the store’s labor problems and over which someone had written, “Mark, you’ll pay for your lies.” He claims he also found a cash register receipt on which someone had sketched a crude picture of an explosive, e.g., dynamite, “cherry bomb,” etc., with the word “Boom” next to it. Adamsky again took this as a personal threat, and claims that he reported these latter incidents to Kern as well as to an unnamed security guard. Kern, who testified at the hearing, was not asked about and consequently did not corroborate Adamsky’s testimony in this regard. Other incidents mentioned by Adamsky as having added to his overall fear that he might be harmed included his discovery of a calendar with the date January 18, 1996, encircled with “D-Day, ha, ha” written next to it; his discovery of a piece of scrap paper in a store shopping cart containing an inverted star with the numbers “666” written in it; and a sign placed on an employee bulletin board on January 30, 1996 (SuperBowl Sunday), on which someone had purportedly written, “the truth, the whole truth, and nothing but the truth” and “here comes the judge.” Again, Adamsky claims that these latter incidents served to increase his fear of bodily harm.

III. DISCUSSION AND FINDINGS

A. The 8(a)(1) Conduct

1. The evictions and threats to arrest nonemployee organizers

As noted, on January 23 and 24, union organizers began leafleting in front of Respondent’s Tunkhannock, Scranton, and Plains stores. On each occasion, the organizers were ordered to leave the property and threatened with arrest if they did not do so. At the Tunkhannock store, organizers Chincola and Corasic opted to leave before the police were called. However, at the Scranton store Chincola did not leave when asked to do so at which point the police were summoned. After being told he would be arrested if he did not move his activities to the entrance and exits of the shopping center, Chincola left. At the Plains store Chincola, accompanied by Kessler and Lazur, again refused to leave and the police were likewise called, but declined to get involved.

The General Counsel contends that the eviction of the organizers from the stores’ parking lots and the accompanying

¹³ Trooper Jordan had already interviewed Adamsky, Zuba, Poltruck, and Brown. Because Jordan knew Cahill, the matter was reassigned to Filarsky to avoid a conflict of interest.

threats to call the police (carried out at the Scranton and Plains stores) and have them arrested if they did not leave violated Section 8(a)(1) of the Act, citing as support therefor the Board's decisions in *Bristol Farms*, 311 NLRB 437 (1993), and *Food For Less*, 318 NLRB 646 (1995), enfd. and rem. in part *O'Neill's Markets v. Food & Commercial Workers Local 88* (8th Cir. 1996).¹⁴ The Respondent counterargues that under the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), it had the right to exclude the nonemployee organizers from the premises, and further claims that given the holding in *Lechmere*, the *Bristol Farms* case was incorrectly decided by the Board. Alternatively, it argues that even under *Bristol Farms*, the eviction of the organizers was justified. A discussion of the property interests held by Respondent with respect to each of the stores in question here, and an analysis of and findings on, the issues, ensues.

(a) *The Tunkhannock store*

The Tunkhannock store is located in the Village Shopping Center on route 29, in Tunkhannock, Pennsylvania.¹⁵ The shopping center is owned by Tunkhannock Partners, L.P., one of whose partners is Joel Flachs, which leases space to the Respondent for the operation of its store and to the other businesses in the shopping center.¹⁶ The lease agreement, on page one, defines the space leased by the owners to Respondent as the "demised premises" "containing approximately 30,875 square feet with approximate dimensions of 154' x 200' as shown on Exhibit 'A' attached hereto."¹⁷ Further, on page 10, the lease agreement provides:

¹⁴ The Eighth Circuit upheld the Board's finding that the employer, *Food for Less*, lacked a sufficient property interest to exclude others from its easement; however, it remanded the matter to the Board for a reassessment of its finding on the area standards picketing.

¹⁵ The Tunkhannock store, like all of Respondent's stores, is located in what is commonly described as a community strip shopping center. Strip shopping centers are distinguishable from shopping malls or other larger regional shopping centers in that they are located and designed to service local communities, are usually smaller, and typically have one large store that is considered the "anchor" store.

¹⁶ P&S Development was the prior owner of the shopping center. The Tunkhannock store lease, entered into between P & S Development and Weis' predecessor, IGA Food Mart, was assumed by Tunkhannock Partners and by Respondent as IGA's successor, and remains in effect (G.C. Exh. 13). Exhibit "D" of General Counsel Exhibit 13 (p. 34) reflects that Zuba executed the lease agreement on behalf of the landlord, P&S Development, as well as for the tenant, IGA Food Mart. Brown testified that when the lease was executed the landlord and the tenant of the Tunkhannock store were one and the same. However, this fact is of no relevance here for it is clear that all times material here, Tunkhannock Partners owned the property, not P&S Development.

¹⁷ Exh. "A" referred to in the lease consists of a site plan of the shopping center (G.C. Exh. 13, p. 4). For reasons unknown, the site plan, which would have provided a visual description of what the "demised premises" consisted of, was missing from the lease agreement. The site plan is of significance here because of Brown's assertion that "from his recollection" Exh. "A" showed that the sidewalk area in front of the Tunkhannock store was encompassed within the 154' x 200' dimensions of the leased space, presumably giving Respondent an exclusive right of control over such space. The General Counsel disputes Brown's assertion in this regard, and lan-

NINE. COMMON AREAS. In addition to the Demised Premises, the Landlord shall make available to the Tenant such Common Areas within or adjacent to the building of which the Demised Premises is a part and elsewhere upon the Shopping Center, together with any Common Areas provided by means of cross or reciprocal easement agreements (herein "REA") as Landlord shall, from time to time, deem to be appropriate for the Shopping Center, and Landlord shall operate and maintain such Common Areas for their intended purposes. Tenant shall have the non-exclusive right during the term to use (for their intended purposes) the Common Areas for itself, its employees, agents, customers, and invitees, subject however, to the provisions of this Paragraph Nine. Landlord shall have the right, at any time and from time to time to change the size and/or location and/or elevation and/or nature of the Common Areas, or any part thereof, including, without limitation, the right to locate thereon kiosks and/or other structures of any type. All Common Areas shall be subject to the exclusive control and management of Landlord, and Landlord shall have the right, at any time and from time to time, to establish, modify, amend and enforce uniform rules and regulations with respect to the Common Areas and the use thereof. [Emphasis added.]

Paragraph Nine further states that the Landlord is responsible for maintaining and repairing the Common Areas including, inter alia, all sidewalks, curbs, shopping center signs, and parking lot, and for the cost of insurance premiums on the shopping center, and expressly identifies such common areas as being made "available" to Respondent for its use in common with other tenants. On March 13, an addendum was added to the lease authorizing the Respondent to "use all reasonable lawful means to prevent trespassing, including the distribution of literature and picketing, on the sidewalk and common areas in front of Weis Markets store." The Landlord, however, reserved "the right to revoke [the] authorization at any time for any reason immediately upon written or oral notice to you." [See G.C. Exh. 14.]

Zuba admits that the lease itself, without the March 13 addendum, does not give Respondent control over any part of the common area, but claims it has always had authority to restrict access to such parts of the common area as the side-

language in the lease agreement itself (at p. 11) suggests that the sidewalk areas are part of the Common Areas over which the landlord retains control and would not have been made part of the leased space. The Respondent proffered no adequate explanation as to why Exh. "A" was not attached to the lease received in evidence or why it could not have been obtained. Respondent's counsel did indicate he had conducted an unsuccessful search a year earlier for the document at Respondent's headquarters. It is quite likely, however, that an inquiry to the Tunkhannock Partners, Respondent's landlord, might have produced more positive results. Thus, I do not credit Brown's unsubstantiated claim that the sidewalk area was part of the "demised premises" and find that the best evidence, which Brown seems to be relying on, is the missing Exh. "A." Accordingly, I find that the sidewalk was not under the Respondent's exclusive use and control during the relevant periods involved here. *Giant Food Stores*, 295 NLRB 330, 332 at fn. 8 (1989).

walk and parcel pickup area pursuant to a “verbal understanding” with the Landlord (Tr. 239–240). Zuba’s claim to a “verbal understanding” with Tunkhannock Partners granting it rights not contained in the lease is inconsistent with, and flies in the face of, section 28 of the lease,¹⁸ which precludes any such agreements.¹⁹ Further, Brown contradicted Zuba in this regard when he testified that the sidewalk and parcel pickup areas are part of the “demised premises” and presumably subject to Respondent’s exclusive control, noting that without such control the Respondent would not have entered into a lease agreement (Tr. 428–429). Clearly, if Brown were to be believed and the above areas were deemed to be part of the “demised premises,” then there would have been no need for the “verbal understanding” alluded to by Zuba granting Respondent a right of control over such areas. I find neither Zuba’s claim of a “verbal understanding” or Brown’s claim that the “demised premises” include parts of the Common Area to be credible. Accepting either claim would necessitate a rejection of express language in the lease that clearly and unambiguously reserves to the Landlord, Tunkhannock Partners, “exclusive control and management” over all Common Areas, and would also be contrary to Board law. *Wehr Constructors*, 315 NLRB 867, 868 (1994). Moreover, if Respondent, as Zuba would have me believe, already had a “verbal understanding” with Tunkhannock Partners, or if the “demised premises” could be construed to include parts of the Common Area, as professed by Brown, there would have been no need for Respondent to solicit the March 13, addendum granting it rights over “the sidewalk and common areas in front of the store.” The fact that it did so leads me to conclude that on January 23, the Respondent knew quite well it lacked the requisite control over the sidewalk, parcel pickup zone, and parking lot in front of its Tunkhannock store to exclude the organizers therefrom.

(b) *The Plains store*

The Plains store is located in the Plains Plaza, a strip shopping center owned by Kenzakoski Brothers, one of whose partners is Charles Kenzakoski who testified in this proceeding. The lease agreement for the store was first entered into in 1984 between Kenzakoski Brothers and the initial lessee, IGA Food Mart (G.C. Exh. 15). The rights under the lease thereafter transferred to Mr. Z’s as lessee. While a precise description of the property subject to the lease is not contained in the agreement, section 5 of the agreement subtitled “Exclusive Use of Premises” implicitly defines the leased area as the actual structure housing the store. Thus, it states, “Tenant shall use and occupy the leased property solely for the purposes of conducting a convention supermarket operation and/or for the sale of any and all items commonly sold in a conventional supermarket and for no other purpose whatsoever.” The Plains expressly identifies

“automobile parking areas, driveways, entrances or exits, service drives . . . , pedestrian sidewalks and ramps” as common areas “for the general use in common” with other tenants, their agents, employees, customers, and invitees.” Thus, section 6, in pertinent part, reads:

Parking and Common Areas

(a) Landlord shall provide automobile parking areas, driveways, entrances or exists (sic), service drives, lighting, truckway or ways, pedestrian sidewalks and ramps, landscaped areas and such other areas (as shown on an attached site plan).

(b) All of the said Common Areas shall be for the general use, in common of Tenants, their agents, employees, customers and envitees (sic), are hereby granted the right to use all of the said common areas for their intended purposes subject to the fact that the Landlord shall have the right, from time to time, to establish, modify and enforce reasonable rules and regulations with respect to said Common Areas; provided, however, that Landlord shall, at all times, maintain and have adequate means of ingress and egress to and from accepted highways and streets.

(d) Landlord shall keep Common Areas in the Shopping Center (including without limitation sidewalks, driveways, service areas, curbs and parking areas) in good order and repair, reasonably free of snow, ice and debris, and reasonably lighted during normal business hours of the major tenants in the Shopping Center. Landlord agrees to carry public liability insurance covering the parking areas and other Common Areas.

As with the Tunkhannock lease, Zuba concedes that the Plains lease does not expressly authorize the Respondent to exercise control over areas outside the store, including the parking lot, and again makes reference to a “verbal understanding” with Kenzakoski granting Respondent such authority. Called as a witness by Respondent, Kenzakoski did not corroborate Zuba’s claim to a “verbal understanding” granting Respondent control over the common areas adjacent to the Plains store. He testified he has no rules restricting solicitation on his property, and that if a tenant requests permission to restrict solicitation, he may or may not allow it.²⁰ Again, except for the addendum added to the lease on June 6 (discussed, *infra*), Kenzakoski gave no indication in his testimony that Respondent had ever asked for, or that he had granted it, permission to prohibit solicitation in the common areas adjacent to the Plains store. In fact, Kenzakoski’s testimony, if anything, undermines, rather than supports, Respondent’s claim to having a greater property interest in such areas. Thus, he testified that when the organizers began leafleting in front of the Plains store, he was asked by a store manager to come to the store to evict the organizers because the store managers “did not have the control or the ability to throw those people off” the premises. By the time he arrived, the organizers had already left. According to Kenzakoski, following this incident, the Respondent asked Kenzakoski for written authority “to throw [the organizers]

¹⁸ Sec. 28 of the lease agreement states: “It is agreed that neither Landlord nor anyone acting on its behalf has made any statement, promise or agreement, or taken upon itself any engagement whatever, verbally or in writing, in conflict with the terms of this Lease, or that in any way modifies, varies, alters, enlarges or invalidates any of its provisions, and that no obligations of the Landlord shall be implied in addition to the obligations herein expressed.” (underlining added; see G.C. Exh. 13, p. 29).

¹⁹ See *Great American*, 322 NLRB 17 fn. 20 (1996).

²⁰ The Plains lease, like the Tunkhannock lease, recognizes the landlords’ exclusive right to make such rules and regulations governing the use of the Common Areas, and make no reference to Respondent’s right to do so (G.C. Exh. 13, p. 11; G.C. Exh. 14, p. 8).

off" the property the next time without having to call him. In response thereto, Kenzakoski and the Respondent on June 6, executed an addendum to the lease that was intended to achieve that goal. The addendum reads: "Tenant shall have the exclusive right to the use of the sidewalk, covered porch and roadway (parcel pickup area) adjacent to its premises for its employees, agents, customers, and invitees, and to enforce it [sic] rules against trespassers, any language in this lease to the contrary notwithstanding." (See G.C. Exh. 15.) Despite the above addendum which on its face grants Respondent authority over more than the sidewalk area, e.g., the parcel pickup portion of the roadway in front of the store, Kenzakoski readily admits that Respondent's rights over this area remains nonexclusive because it would not, for example, permit Respondent to interfere with the right of passage by other tenants' customers through the parcel pickup area. Thus, Kenzakoski's testimony that he controlled the sidewalk adjacent to the store, that Respondent had to call him to the store to carry out the eviction of the organizers, and Respondent's subsequent request for written authority to expel organizers in the future, belies and renders specious Zuba's and Brown's claim to the existence of a "verbal understanding." Accordingly, I find that on January 24, when the Respondent evicted Chincola from the parcel pickup area it lacked the authority to do so.

(c) *The Scranton store*

The Scranton store is situated on South Washington Ave. in Scranton, Pennsylvania, in a shopping center commonly referred to as the IGA Shopping Center. The lease agreement governing Respondent's property rights at the Scranton Store was entered into between Fazio Associates as lessor, and IGA Food Marts as lessee in 1976. The shopping center was subsequently assigned to Lone Star Equities (with William Fennie serving as managing agent for the property), and following Mr. Z's purchase of the IGA Food Mart store, the latter as a successor tenant assumed the lease.

Under the lease agreement received in evidence as General Counsel 16, the Respondent leases space described as "property situated in [Scranton] at the intersection of South Washington Avenue and Elm Street, being part of the same premises as are described in Lackawanna County records, together with a store building and improvements and consisting of 35,526 square feet to be used as an IGA Food Mart Store. The Scranton lease, unlike the Tunkhannock and Plains lease, makes no reference to a common area of the shopping center. It states, however, that the Landlord is obligated to "maintain and repair the macadam on the exterior of the demised premises," and that the tenant is to "pay the entire costs of repairing and maintaining curbs and sidewalks on the exterior of the demised premises." (G.C. Exh. 16, p. 8-9.) On June 15, in response to a request from Respondent, Lone Star Equities executed an addendum, similar to that obtained by Respondent at its Tunkhannock and Plains stores, giving Respondent exclusive rights over certain common areas of the shopping center. The addendum states that the "Tenant shall have the exclusive right to the use of the sidewalk, covered porch and roadway (parcel pickup area) adjacent to its premises for its employees, agents, customers, and invitees, and to enforce it [sic] rules against trespassers, any

language in this lease to the contrary notwithstanding." (G.C. Exh. 16.)²¹

Richard Bishop, an attorney, was called by Respondent to explain the extent of Respondent's property interest in the Scranton store and common areas.²² Bishop testified that Lone Star Equities does not have any rules against solicitation at the IGA Shopping Center, and contends that the Landlord basically treats any requests for solicitation as matters to be handled by the individual businesses that lease space from it. He claims that each tenant, including the Respondent, retains exclusive control of the sidewalk and parcel pickup area in front of the stores. Thus, while the Scranton store lease is silent on the Respondent's right to control who may or may not enter into such areas, Bishop, without pointing to any supporting documentation, averred that Respondent could exclude noncustomers, including patrons or employees of other businesses in the shopping center, from entering into the sidewalk and parcel pickup areas in front of its store.²³ However, when pressed by Charging Party's counsel, Bishop admitted that prior to the June 15, addendum there was nothing in the lease which authorized Respondent to exclude such persons from the sidewalk area in front of its store.

²¹ The addendum was sent to Zuba with an accompanying letter which read: "This will confirm that Weis Markets, Inc. is authorized until further notice to act on behalf of Lone Star Equities, Inc., and William J. Fennie to use all reasonable lawful means to prevent trespassing, including the distribution of literature and picketing either in or on the sidewalk and common areas in front of Weis Markets' store." (Tr. 971.)

²² Bishop is with the firm of Hourigan, Kluger, Spohrer, and Quinn, which advises Lone Star Equities and Fennie on a variety of legal matters, including real estate.

²³ The Respondent introduced into evidence a document labeled R. Exh. 71, prepared in 1985 or 1986, containing a description of the various properties at the shopping center which was to serve as a prospectus for potential buyers of the shopping center. Page two of R. Exh. 71 purports to show that at that time, IGA, Respondent's predecessor, was responsible for maintaining liability insurance on the entire shopping center, and for maintaining the entire parking lot, curbs, walks, lighting, and for plowing. The Respondent attempted to show through this document that Respondent had exclusive control over the common areas of the shopping center. The document, however, is entitled to little or no weight. Thus, Bishop, through whom the document was introduced, had no role in its preparation and was not certain who prepared the document (testifying first that it was a real estate agent or broker but adding the property owner may have done so). Although Bishop testified that the document was prepared as a form of prospectus for potential buyers of the shopping center, his lack of involvement in the document's preparation and his inability to identify its creator makes clear that he had no way of knowing how the information contained therein was gathered, whether it was accurate, or whether it contradicts actual provisions in the lease agreements held by the various businesses in that shopping center. In fact, the reference therein to IGA having responsibility for "all parking areas including plowing, repairs and lighting" conflicts with express language in the Scranton store lease which imposes such responsibility on the landlord (G.C. Exh. 16, p. 8-9). Further, the inclusion of a disclaimer regarding the reliability of the information contained therein makes clear that the party who prepared the document was unsure of the document's accuracy. In light of the above, and particularly given the apparent discrepancy between the document and provisions of the Scranton lease, I place no reliance on Respondent's Exhibit 71.

Bishop was not a convincing witness. Despite professing knowledge of the extent of Respondent's interest in and control over the common areas of the shopping center, he readily admits he was not involved in the preparation of the lease agreement and has had no involvement in the management of the shopping center. Bishop therefore was hardly qualified to provide evidence as to the degree of control Respondent had over the common areas of the shopping center. Further, his testimony seemed contrived and purposefully slanted to portray the Respondent as having a greater interest in and control over the common areas of the shopping center than can be gleaned from the Scranton lease agreement itself. Bishop's claim, for example, that Respondent had the exclusive right to exclude noncustomers, such as other tenants' patrons and employees, from the sidewalk and parcel pickup areas adjacent to its store finds no support in the lease and appears to be based on nothing more than an unsubstantiated belief on Bishop's part. While there is no question that the lease requires the Respondent to repair and maintain the curb and sidewalk areas adjacent to its store, this fact alone does not translate into an exclusive right to deny others access to those areas. Further, although Respondent's lease is silent as to the degree of control the Respondent has with respect to the shopping center's parking lot, leases entered into between Lone Star Equities and other tenants make clear that said tenants, and inferentially Respondent, hold at most a nonexclusive easement over the common areas of the shopping center.²⁴ Finally, the fact that Respondent felt the need to obtain an addendum to its lease agreement authorizing it to evict trespassers from the sidewalk and parcel pickup areas adjacent to its store provides in my view compelling evidence that Respondent had no such authority in the first place and knew this to be the case. Any suggestion by Bishop that Respondent was simply confirming in writing what it had a right to do is rejected. Bishop, as noted, was not a credible witness. He was at times evasive and unwilling to provide straightforward answers to rather simple questions posed to him by the Charging Party's counsel. These factors, as well as his poor demeanor as a witness, lead me to doubt his overall veracity.

Analysis

The Respondent argues initially that because the Union had other reasonable alternative means of communicating with its employees, a fact which the General Counsel does not dispute, the eviction of the organizers from the sidewalk and parcel pickup areas adjoining its stores was proper and lawful under the Supreme Court's holding in *Lechmere*. It contends that the Board's holding in *Bristol Farms*, requiring that an employer first establish that it has a sufficient interest in the property entitling it to eject others therefrom, and its

reliance on state law in making that determination, contravenes the holding in *Lechmere* and was improper (R. Br. 30).

Briefly, in *Lechmere* the Court reaffirmed its earlier holding in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) that an employer may prohibit nonemployee organizers from coming onto its property to engage in organizational efforts, except in those rare instances where no reasonable means of communicating with the employees exists, in which case the Board must balance the employer's right to control access to its property with the Section 7 right of union organizers to communicate with employees, taking care that the accommodation between these competing interests be obtained with as little destruction of one as is consistent with the maintenance of the other. In so doing, the Court rejected a multifactor balancing test set forth by the Board in *Jean Country*, 291 NLRB 11 (1988), intended to resolve such issues.²⁵ However, the Court's rejection of the Board's *Jean Country* analysis "did not affect the legality of employer attempts to bar access to property that is not the employer's to control." *Lechmere, Inc.*, 308 NLRB 1074 (1992); *Loehmann's Plaza*, 316 NLRB 109, 113 fn. 12 (1995) (*Lechmere* "did not change the rule that a property right can be asserted only by the party who possesses that right."); *Great American*, 322 NLRB 17 (1996). The Board's view in this regard was recently reaffirmed by the Eighth Circuit in its partial enforcement of the Board's holding in *Food for Less*. Thus, the Eighth Circuit noted that the *Lechmere* decision left undisturbed the Board's prior holdings²⁶ "that an employer lacking the right to exclude others from certain property violates Section 8(a)(1) when it removes section 7 actors from those areas," and that before a *Lechmere* balancing of rights becomes necessary, the threshold question that must be answered is whether, at the time the employer sought to exclude the organizers, it possessed a sufficient property interest entitling it to do so. Absent such a showing, there is no conflict between the employer's property right and the organizers' Section 7 right requiring a *Lechmere*-type of analysis and accommodation. 95 F.3d at 738.

In assessing the extent of an employer's interest in the property from which it seeks to exclude others, the Board considers such factors as applicable state property laws, along with relevant documentary and other evidence. *Bristol Farms*, supra. The Board's reason for referencing state law in making its assessment was made clear in *Bristol Farms*. Thus, quoting the Supreme Court in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), the Board observed that "property interests are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." The Board's recourse to state law as a factor to be considered in ascertaining the extent of an employer's property interest is fully consistent with Supreme Court precedent. See also 95 F.3d 733. Finally, and as the Respondent must certainly be aware, I am bound to adhere to and apply existing Board precedent until such time as they

²⁴ Thus, the lease agreements of shopping center tenants Rite-Aid Corporation and Scranton Business and Postal Center, both of which remain in effect, reflect that such areas of the shopping center as the parking lot, sidewalks, ramps, and pickup stations are to be used and shared in common among all tenants (CPX-1, p. 4; CPX-2, p. 11). It is highly unlikely and frankly illogical to believe that the landlord, Lone Star Equities, would on the one hand grant to Respondent at its Scranton store exclusive right to the sidewalk or parcel pickup areas with the right to exclude everyone else, but at the same time grant other tenants the contractual right of access to those same areas.

²⁵ See, e.g., *Leslie Homes, Inc.*, 316 NLRB 123, 126 (1995); *Oakland Mall*, 316 NLRB 1160 (1995).

²⁶ See, e.g., *Barkus Bakery*, 282 NLRB 351 (1986); *Polly Drummond Thriftway*, 292 NLRB 331 (1989); *Giant Food Stores*, 295 NLRB 330 (1989); *Johnson & Hardin Co.*, 305 NLRB 690 (1991); *Great American*, supra.

are overruled by the Board or the Supreme Court. *Ford Motor Co.*, 230 NLRB 716 (1977); *Prudential Insurance Co.*, 119 NLRB 768 (1957). Thus, any disagreement it may have as to the Board's holding in *Bristol Farms*, supra, is a matter that only the Board can address, and any suggestion that I somehow ignore or give no weight to the holding in that case is simply misguided and without legal support.

Alternatively, the Respondent argues that it holds easement rights to the common areas adjacent to its three stores and that under Pennsylvania law the holder of an easement is deemed to possess a sufficient interest in the property entitling it to exclude others, e.g., trespassers, union organizers, from entering thereon. As found above, the Respondent's interest in the common areas adjoining all three stores amounts to nothing than a nonexclusive right to use the areas for limited business purposes. Thus, any property interest it may be said to have can at best be described as a nonexclusive easement, similar to that possessed by the employers in *Bristol Farms*, and *Food for Less*, supra. The Respondent, however, contends that unlike the California and Missouri property laws considered by the Board in *Bristol Farms* and *Food for Less*, respectively, Pennsylvania law affords easement holders greater rights, including the right to evict trespassers therefrom. In support thereof, the Respondent cites to several state court decisions, none of which, on review, I find to be particularly relevant to the issue at hand.

Checker Oil Co. v. Harold H. Hogg, 251 Pa. Super 351 (1977), cited by Respondent, for example, did not involve a lessee's right over a nonexclusive easement, but rather, as recognized by Respondent in its brief (p. 37) dealt with a landlord's interference with the premises actually leased to the lessee. Similarly, *Weigand v. American Stores*, 348 Pa. 253, 29 A.2d 484 (1943), involved a suit for damages against a lessee for injuries sustained by a pedestrian on a driveway over which the lessee held a nonexclusive right of use. The court found no liability on the lessee's part because the latter lacked exclusive control over the easement.²⁷ *Ellis v. Academy of Music*, 120 Pa. 608 (1888), another case cited by Respondent, likewise has no bearing on the issue at hand as that case involved a tenant's right to bring an action for nuisance over property which it held in fee simple with another co-tenant. The other cases cited by Respondent, e.g., *Louis W. Epstein Family Partnership v. K-Mart*, 13 F.3d 762 (3d Cir. 1994), *Trimble Services, Inc. v. Franchise Realty International Corp.*, 445 Pa. 333 (1971), *Rusciolelli v. Smith*, 195 Pa. Super. 562 (1961), are factually distinguishable and offer no assistance in determining whether the Respondent was within its rights under Pennsylvania law to eject the organizers from property over which it held nonexclusive easement rights.²⁸

²⁷ The court in *Weigand* found the case distinguishable from *Philadelphia v. Merchant & Evans*, 296 Pa. 126, where a lessee was found liable for an accident occurring on a driveway adjacent to its leased premises because the lease agreement clearly conveyed to the lessee the exclusive use of the driveway. Clearly, if under *Weigand* a lessee cannot be held liable for injuries sustained on property over which it holds a nonpossessory interest, one can reasonably infer that the lessee would also lack legal standing to bring an action for trespass regarding such property.

²⁸ The Respondent also relies on the Pennsylvania Supreme Court's decision in *Logan Valley Plaza, Inc. v. Amalgamated Food Employees Union*, 227 A.2d 874 (1967). That decision, however, in-

However, *Northeast Women's Center, Inc. v. McMonagle*, 670 F.Supp. 1300 (E.D. Pa. 1987), cited by the General Counsel and the Charging Party in their posthearing briefs, does provide some guidance on this particular question. In *Northeast Women's Center*, the named plaintiff, an abortion clinic, sought to enjoin certain protesters from entering its suite of offices leased to it by the lessor, L.P. Partnership. These offices, located in an office building, were under the exclusive control of the clinic. The clinic also sought to enjoin the protesters from entering the property immediately surrounding the office building. While the surrounding area was not part of the premises leased by the clinic, the latter claimed it had "constructive possession" of such outside areas by virtue of a "NO TRESPASSING" sign it had posted on that property, entitling it to bring the trespass action against the protesters with respect to the outside areas. The court rejected this latter claim. Thus, the Court recognized that the clinic was within its right to sue for trespass as to its office suites because it retained exclusive rights to the office space under the lease. However, citing Pennsylvania case law,²⁹ "the court reasoned that the clinic could not seek relief for the trespass to property it did not possess, e.g., the outside areas surrounding the office building, and that even if the clinic were able to show that L.P. Partnership [did not consent] to the [protesters] continuing presence on [its] land, the [clinic's] recovery—and thus its cause of action—is limited to land it possesses." 670 F.Supp. at 1312. In light of the above, it appears that under Pennsylvania law the Respondent did not have the right to exclude the organizers from either the sidewalk, parcel pickup, or parking lot areas adjacent to its stores.

The Respondent also cites the fact that it has been permitted to use the sidewalk adjacent to its stores to conduct sidewalk sales and to store its shopping carts, that it patrols the common areas to check for misplaced shopping carts and for hazardous conditions, that it has removed skateboarders from the area, and that it is required to maintain liability insurance, as evidence that it possesses sufficient control over the common areas entitling it to remove trespassers therefrom. However, the mere fact that the owners of the properties in question may not have objected to Respondent's use of the sidewalk to conduct business and to store its carts, or that Respondent on occasion may have chased away an errant skateboarder, can hardly be viewed as evidence that it had the right to prevent others from entering such common areas, or that the owners had given Respondent a greater right to the property than the nonexclusive use expressly conveyed to it under the leasehold agreements. Indeed, Respondent's arguments in this regard are similar to those presented to and rejected by the Board in *Food for Less*, supra. In rejecting such arguments, the Board in *Food for Less* noted that the employer had not "shown that under state law its

involved the right of owners of property in a shopping center to prevent a union from entering its property to engage in informational picketing. The State court in *Logan Valley* was not asked to decide, and consequently did not pass, on the question of whether under Pennsylvania law the right to exclude extends to those who do not own the property from which exclusion is sought, and who may simply retain a nonexclusive right to its use. The Logan Valley decision is therefore factually distinguishable and clearly inapposite to the facts herein.

²⁹ *Wilkinson v. Conrail*, 158 Pa. 126 (1893).

liability insurance coverage and its repair and maintenance of the parking lot transformed the easement interest set forth in the lease into a more substantial property right providing the legitimate power to expel.” A similar finding is warranted here. Accordingly, as the Respondent on January 23 and 24, had no legal right to exclude individuals from the sidewalks, parcel pickup areas, and parking lots adjacent to its stores, its attempts to eject the nonemployee organizers peacefully engaged in distribution of union material to employees from said areas, and its calling of the police to assist in those efforts, interfered with its employees’ organizational rights and violated Section 8(a)(1) of the Act.³⁰

2. The promulgation of the no-solicitation/no-distribution rule

The complaint alleges, and the Respondent denies, that the promulgation of a no-solicitation/no-distribution rule in January was unlawful. The evidence reflects that Respondent instituted the ban in direct response to the Union’s initial organizational efforts. Thus, although Weis had always restricted solicitation at its stores, Zuba had maintained an open policy and continued to do so for 2 years after being bought out by Weis. Zuba readily concedes, however, that only after union cards and literature were discovered in one of his stores in the summer of 1994, and after being pressured by Weis’ legal counsel, did he decide to adopt Weis’ no-solicitation policy, claiming this was done to ensure that a “Union would not be able to successfully solicit at [his] stores.” Zuba candidly admitted that it was the “very real prospect that [his] employees might try to unionize” which led to the change in policy. Significantly, Zuba was not so much concerned with the possibility that solicitation might occur inside the stores. Rather, he testified that his real “concern” was that people had been allowed to solicit “in front of our stores” and that “we cannot have that happen,” presumably because the Union would likewise be entitled to solicit in front of his stores (Tr. 256). Thus, Zuba’s testimony, as well as his directive to Chincola outside the Tunkhannock store to stop bothering Cahill, makes clear that Respondent’s sole purpose in posting the cardboard no-solicitation signs at its stores in January was to prevent union organizers from using the common areas adjoining its stores to distribute literature or in some other manner to communicate the Union’s message to employees. However, as found above, the Respondent lacked the requisite property interest needed to lawfully exclude the organizers from the common areas, and as the holding in *Northeast Women’s Center* demonstrates, under Pennsylvania law the mere posting of the no-solicitation sign by Respondent would not have altered that fact. Thus, the *Babcock & Wilcox* principle (supra at 112), that “an employer may validly post his property against nonemployee distribution of union literature” does not come into play with respect to the common areas adjacent to Respondent’s stores as said areas were someone else’s, and not Respondent’s

property to control. The rule was therefore unenforceable to the extent it attempted to restrict conduct occurring in the common areas.

However, notwithstanding the General Counsel’s Charging Party’s assertion to the contrary, the rule, in my view, is valid and enforceable with respect to those areas exclusively under the Respondent’s control, e.g., the stores themselves. As stated in *Babcock & Wilcox*, a rule that prohibits solicitation on company premises by nonemployee union organizers is ordinarily presumed valid and will be overturned only on a showing either that the rule discriminates against unions by allowing other nonunion solicitation, or that no reasonable means of access to employees exist. See *United Food & Commercial Workers v. NLRB*, 74 F.3d 292 (D.C. Cir 1996); also *Big Y Foods*, 315 NLRB 1083, 1086, quoting *Belcher Towing v. NLRB*, 614 F.2d 88 at 90 (5th Cir. 1980). The General Counsel readily admits that the Union had other reasonable means of communicating with employees, and that the no-solicitation rule has been applied in a nondiscriminatory manner to both union and nonunion solicitation.³¹ Notwithstanding such admissions, he and the Charging Party contend that the validity of the no-solicitation rule be determined by looking at the Respondent’s motivation for implementing the rule. Clearly, such an approach would favor the finding of a violation for the weight of the evidence, more particularly Zuba’s testimony, reveals that Respondent was motivated by purely antiunion considerations in enacting such a rule. However, to accept such an approach would be to add another dimension to the *Babcock & Wilcox* test for deciding whether such a rule can be deemed valid. In fact, the Court’s holding that except for the two stated conditions an employer may lawfully post its property against solicitation, in my view, strongly suggests that such a rule would be considered valid even if the employer’s motives for doing so were less than altruistic, e.g., to keep a union off its property. Thus, a finding that the rule is unlawful because it was motivated by antiunion considerations would be tantamount to a rejection of the *Babcock & Wilcox* test which, by the General Counsel’s own admission, has been satisfied here.³² In light of the above, I find that the Respondent’s no-solicitation rule is valid under *Babcock & Wilcox*, but only insofar

³⁰ The record fails to establish that the organizers in any way interfered with or obstructed the right of Respondent’s customers to freely use the sidewalk or parcel pickup areas to enter or exit any of the three stores in question, or with their customers’ right to use the parking lot adjacent to its stores. Under these circumstances, the leafleting did not constitute a nuisance. *Food for Less*, supra at 650, fn. 7.

³¹ The Charging Party suggests in its posthearing brief (pp. 35–36) that Respondent’s no-solicitation rule was not applied in a non-discriminatory manner, and cites to Brown’s testimony that organizations seeking to solicit were being told to put their requests in writing and that Respondent would respond to such requests. Although, as testified to by Brown, he gave instructions to secretary/receptionist Matthews to tell potential solicitors to put their requests in writing and that such requests would be responded to, his instructions hardly constitute evidence that Respondent intended to grant any such requests. Indeed, Respondent may simply have wanted to politely inform the potential solicitor, in writing, of its new policy against solicitation.

³² The General Counsel readily acknowledges the clear distinction long drawn by the Board and the courts between the Sec. 7 rights afforded to employees versus those granted derivatively to non-employee organizers. It is this distinction which provides the justification for allowing an employer to prohibit on a nondiscriminatory basis nonemployees from entering its property even if motivated by antiunion reasons. See *Nashville Plastic Products*, 313 NLRB 462 (1993).

as it applies to the areas over which it has exclusive control, e.g., the stores themselves.³³

3. Threats of store closings, loss of jobs, and other alleged unlawful statements

(a) *The January 23, morning meeting*

The General Counsel contends that at the 7 a.m. meeting, Zuba unlawfully threatened that if the Union came in, it would not expand the Tunkhannock store as planned, the store would close, and employees would lose their jobs, and suggested it would be futile for them to select the Union as representative because the Union could do nothing for them or prevent the store from closing, and further urged the Union's most ardent supporter, Cahill, to resign by telling him to go on welfare. In support thereof, the General Counsel cites to the testimony of Cahill, Burroughs, Miller, and Bonavita all of whom, with some minor and inconsequential variation, testified to having heard Zuba make some or all of the above remarks. In turn, the Respondent, in addition to Zuba's denials, relies on testimony provided by Rinaldi, Davis, and Adamsky, and by employees Sherry Metz, John Swick, Stella Sands, and Shirley Dymond to support Zuba's denials and to refute the above allegations. A recitation of the testimony provided by the above individuals follows.

The General Counsel's Witnesses

Cahill: Cahill testified that the meeting was held in a back room of the Tunkhannock store, that Zuba was the only speaker, and that it lasted approximately 15 minutes. Cahill claims that Zuba informed employees that the Union had been trying to get employees to sign cards and that he thought the employees were doing fine at the store. Zuba then stated that "if the Union does get in, that he would close the store, there would be no expansion, and there would also be no jobs there at Tunkhannock." He further commented that the Union "couldn't help us, just like they

didn't help" the Acme Warehouse and Insalacos, two other area stores that had closed down. According to Cahill, Zuba's remark about closing the store was made several times. At one point in the meeting, Cahill asked Zuba "how come a person on welfare and public assistance can make more money than we do working for him" to which Zuba replied, "Why don't you go welfare; you can quit and go on public assistance and welfare." (Tr. 50-52.)

Burroughs: At the time of the hearing, Burroughs was still employed by Respondent. According to Burroughs, the meeting lasted anywhere from 30-45 minutes. His testimony as to what was said at this meeting was more limited than that provided by Cahill, due in all likelihood to the fact that the General Counsel, for whatever reason, did not pursue this line of questioning. However, when asked on direct examination what Zuba said at the meeting, Burroughs testified that Zuba "was talking about the Union and if the Union got in there, they wouldn't do anything for us, but take our money; and if the Union did get in there, he would close the store." (Tr. 105.) Burroughs further testified, on cross-examination, that Zuba told employees that the Union "wouldn't do any good for us; all it would do is take our money" and that "Weis would never allow a union to come into the store." According to Burroughs, Zuba's store-closing remark was made only once. He could not, however, recall if Zuba told employees it was up to them to decide whether or not to sign union cards, or whether he spoke about the competition in the supermarket industry. He did not recall any specific mention of the Acme store, or whether Zuba told employees the Union was unable to protect the jobs of the Acme employees when the store closed. He did testify, however, that Zuba's focus during the entire meeting concerned "the Union and the possibility that the store would close if the Union came in." (Tr. 113-115.)

Miller: Miller, who was also still employed by Respondent when he testified, recalls the meeting lasting from 20-30 minutes, and testified that during the meeting Zuba talked about how unions were no good, how all they wanted was to take your money and would not help or stand by you, and how he had seen them ruin stores in Wilkes-Barre and Scranton, Pennsylvania. He recalled Zuba stating on at least two or three occasions that "there would never be a union in Mr. Z's or Weis' stores, because they would close them down, and we would all be out of a job." Miller testified to hearing Cahill tell Zuba that he (Cahill) would be better off and receive more on welfare than working at the store, and Zuba responding, "why don't you quit and go on welfare." He did not specifically recall if Zuba mentioned that the Union had not protected employees of other area chain stores which had closed. When pressed by Respondent's counsel to explain what he understood Zuba was trying to tell employees regarding the Union and the closing of area stores, Miller responded, "I thought he was trying to get across that if we wanted to take a vote and try and get a Union in there, that they would close down and we would all be out of a job." Miller did not recall Zuba stating that the store would not be expanding if the Union came in. (Tr. 146; 154-156.)

Bonavita: Bonavita voluntarily left Respondent's employ in June 1995, but was an employee on January 23, and attended the mandatory employee meeting held that day by Zuba. She recalls Zuba telling employees at this meeting that the Union was trying to get into Mr. Z's, and recommending

³³ I find it unnecessary to pass on the whether the addenda to the Tunkhannock, Plains, and Scranton store leases entered into between Respondent and its lessors respectively on March 13, June 6 and 15, afforded the Respondent any greater right to evict the organizers from the common areas. As noted, at issue in this case is whether, when it evicted the union organizers from the common areas adjacent to its stores on January 23 and 24, the Respondent had the right to do so under the terms of the lease agreements then in effect. The addenda, executed months after the above incidents, clearly would have no bearing on the above issue and, as found herein, are relevant only to the extent that they support the reasonable inference that if Respondent had such authority on January 23 and 24, it would not have needed to amend the leases to acquire such rights. This is not to suggest that the Respondent achieved its goal through these amendments, for it is not all that clear from the wording of the addenda, and other evidence of record, including Kenzakoski's testimony, that the Respondent now enjoys the exclusive right to control the common areas entitling it to eject trespassers therefrom. This is, in any event, an issue that I need not address in resolving the complaint allegations. As noted by the General Counsel in his posthearing brief, the complaint does not allege that the entering into these amendments was unlawful, and while there was evidence adduced at the hearing regarding these amendments, absent some allegation or evidence that organizers were denied access on the basis of the addenda provisions, I decline to speculate on their validity or effectiveness.

against it because “it wouldn’t benefit us.” Zuba went on to state that “if the Union got in, Weis would close the store down and that the employees that were there would not be rehired” if Weis were to subsequently decide to reopen. She also recalled Zuba talking about other unionized area stores closing down, specifically mentioning Acme, and warning that the same thing could happen to Mr. Z’s. According to Bonavita, Zuba did not state that the Union could not protect the employees of those stores that were closing down. When asked if she could have misinterpreted Zuba’s comments about other stores closing down, Bonavita emphatically answered “No,” and reaffirmed her testimony that Zuba told employees that “the Tunkhannock store could close down, like other chains, if the Union were successful.” Bonavita claims Zuba did not discuss expansion of the Tunkhannock store, and did not recall him telling employees that the Union was unable to guarantee job security for employees at the Acme and Giant stores. She did recall Cahill addressing his welfare remark to Zuba, but testified that Zuba “more or less brushed him off” without really giving him an answer. (Tr. 167–169; 172–177.)

The Respondent’s Witnesses

Zuba: Zuba admits holding employee meetings at the Tunkhannock store on or about January 23,³⁴ stating that his purpose for doing so was to “stress our part of the case; we wanted [employees] to know exactly how they stand.” According to Zuba, he conveyed to employees what unionization might mean to them from an employer’s point of view (Tr. 222–233). He testified that he talked about the nature of Respondent’s competition, and about union authorization cards and how the Union needed to obtain a certain percentage of cards to obtain an election. He recalls telling employees that while his stores had never had a lay off, other area stores, particularly an Acme store in Stroudsburg, had closed and employees told to commute to a more distant store in Reading, Pennsylvania to retain their jobs, and that other Acme stores between Stroudsburg and Reading were considered “hardship” stores. Zuba claims he told employees that in contrast to what had occurred at Acme, when his stores were slow, rather than lay off people, employees were allowed to transfer from store to store every day or two. He nevertheless emphasized that as with the Acme stores there were no guarantees or protection. Zuba claims he also mentioned that another supermarket chain, Giant stores, once had 23 stores, but that as of the date of the meeting only 1 store remained, pointing out in this regard that there was no job security for employees. Zuba testified that his comments about the other stores and job security for employees was intended as a response to the promise of job security purportedly made by the Union in its mailings to employees, and to further point out to employees that while unions “can promise you everything” fulfilling that promise is “something else” and that he himself could make no guarantees either as he did not own the store. Zuba claims that by referencing what had occurred at the Giant and Acme stores, he was simply trying to convey to employees that “there is

no such thing as job security” because jobs depend on “volume” and “business.” According to Zuba, he also told employees that his merger with Weis turned out to be a “good marriage” because with Weis’ wealth behind them, “we can expand our operations.” Finally, Zuba recalls Cahill asking him a question about welfare, and that he simply replied Cahill was asking the wrong person, and that if he (Cahill) wanted to go on welfare, “I’d invite him to do so.” Zuba expressly denied ever telling employees that the Tunkhannock store would never have a union or threatening to close the store and putting everyone out of work. When asked if he ever told employees it would do them no good to select the Union because it could do nothing for them, Zuba did not outrightly deny making such remark but claims he simply told them, “it was their decision.” (Tr. 1027–1031; 1035–1042.)

Rinaldi: Rinaldi testified that the January 23 meeting focused in on “the Unions protecting [employee] job[s]” and that in this regard Zuba mentioned that the Acme and Giant supermarkets in Stroudsburg had closed without there being any protection for the employees by the unions in that area, and how a store’s customer base was the only thing that could protect employee jobs. Through some insinuating questioning by Respondent’s counsel, the latter was able to get Rinaldi to deny that Zuba threatened to close the store if it became unionized, that he expressed any opinion as to what would happen if the Union organized the store, that he commented the store would close or not expand if the Union came in, or said that the Tunkhannock store would never have a union because Weis Markets would close the store. He similarly denied having heard Zuba tell employees it would do them no good to select the Union as bargaining agent because it could do nothing for them, or tell them that if the Union came in the stores would close and everyone would be out of a job. He was able to recall, without any prompting from Respondent’s counsel, Cahill’s welfare remark, and Zuba’s response thereto, that he did not have an answer for Cahill but that if Cahill could make more money on welfare, “go ahead and try it.” Finally, on cross-examination, Rinaldi recalled Zuba telling employees that Union could not give them job security and making reference to the closing of the Acme and Giant supermarkets (Tr. 868–870; 880–882).

Davis: Davis testified he attended both the morning and afternoon meetings at the Tunkhannock store, and that the meetings were intended as a morale booster for employees and not to discuss the Union. Davis claims that Zuba discussed such things as Respondent’s competition and the Blue Cross/Blue Shield medical plans. He recalls, however, that the issue of the Union came up only when Zuba was asked whether employee jobs would be secure if there was a union in the store. Zuba purportedly responded “No” and proceeded to tell employees that while a union might make a promise, it may not be what employees get because “the last word would come from the store owners.”³⁵ Davis also recalled that Cahill asked Zuba why someone on welfare could make more money than someone who worked for a living, and that Zuba replied he could not answer that but if Cahill

³⁴ Zuba believes the Tunkhannock store meetings occurred on January 21. Given the testimony of other witnesses, I am convinced he was mistaken and that the meetings actually were held on January 23.

³⁵ On cross-examination, Davis changed his testimony somewhat by admitting that it was Zuba who brought up the issue of the Union on his own and not in response to any particular question.

felt he could make more money on welfare, then he should go on welfare. Davis had no further independent recollection of what else Zuba might have said at the meeting. However, as he did with his other witnesses, Respondent's counsel led Davis through a series of leading questions resulting in Davis expressly denying that Zuba ever told employees that if the Union came in the stores would close and there would be no jobs, or telling them there would never be a union in the store because Weis would close the store and everyone would be out of work. He further denied that Zuba told employees it would be futile for them to select the Union as the Union could do nothing for them (Tr. 259-260; 924-927; 944-948).

Adamsky: According to Adamsky, during the morning meeting Zuba expressed his concern for employees at all the stores, and specifically mentioned how the Acme and Giant supermarkets had gone out of business and were no longer in the area, and suggested that employees consider what happened to these stores before considering "any type of representation or anything like that." Further, without being asked Adamsky volunteered that Zuba did not discuss such things as "raises or benefits or anything like that."³⁶ Adamsky claims that Zuba told employees the store would be remain open whether there was a union, but reminded employees that they should nevertheless think before doing anything in light of what had happened at other area stores. As occurred with Rinaldi, Davis and several other employee witnesses, Adamsky had little or no independent recollection of what else Zuba may have said during the meeting, and it was only when prompted with leading questions did Adamsky deny that Zuba told employees the store would close if the Union came in; or that the Tunkhannock store would never have a union because Weis would close the store, or that it would do the employees no good to select the Union as bargaining agent because it could do nothing for them.

Metz: Metz recalls that the meeting lasted no more than 10 minutes, that about 20 employees were in attendance, and that Zuba began by informing employees that "there's Union activity in our store and that the Union might be sending out cards to our homes." She recalls Zuba saying the store could become unionized if 35 percent of the people signed cards, and that it was up to the employees to decide whether or not to sign a card. Zuba also discussed the fact that the Acme store in Stroudsburg had closed, that the Union did not help the employees and some of them lost their jobs or got laid off. She claims Zuba also told employees that despite the increased competition, with Weis' backing he was able to expand the stores, something he was not able to do when the stores were independently own. Like the other witnesses, Metz heard Cahill ask Zuba why people on welfare could make more money than employees at the store. She claims Zuba asked Cahill how long he had been employed at the store, and when Cahill responded six months, Zuba told him he couldn't resolve Cahill's problem and that Cahill should

go on welfare if he thought he could make more money. Finally, through a series of leading questions put to her by attorney Lewis in what took on the appearance of a well-rehearsed script, Metz answered, with a simple "No" when asked if she had heard Zuba threaten to close the store if it became unionized, give an opinion on what would happen if the Union organized the store, tell employees that the store would not expand and would close if the Union came in, say that the Tunkhannock store would never have a union because Weis would close the store, tell employees it would do them no good to select the Union as their bargaining agent, or say that if the Union came into any of the stores, they would close and everyone would be out of a job (Tr. 680-683).

Swick: Swick, A receiving clerk at the Tunkhannock store, heard Zuba basically talk about a competitor supermarket, Insalacos, how Respondent had to stay sharp as a result, and about plans to remodel the store. He claims Zuba discussed how the unionized competition was doing, and "just might have mentioned" that the Acme and Giant stores in the area "were union and weren't doing well at the time." The highlight of the meeting, according to Swick, was when Cahill mentioned he could make more money on welfare, and both Zuba and Cahill "sort of started arguing." Zuba then told Cahill "to go on welfare." Beyond this, Swick could recall little else of what Zuba may have said. Despite the leading questions posed to him by attorney Lewis, Swick testified he could not recall if Zuba commented on what would happen if the Union came into any of Mr. Z's stores, if he mentioned the store would close and there would be no jobs if it became unionized, or whether he told employees it would do them no good to select the Union as their bargaining agent because the Union could do nothing for them. Swick, however, expressly denied that Zuba told employees there would be no expansion of the store because of the Union. On cross-examination, Swick suggested that the discussion of the Union was only a minor part of the meeting, and that the principal focus of the meeting was Respondent's competition. However, while claiming that he paid close enough attention to what was being said, he admitted he could only remember "bits and pieces."

Sands: Employed as an assistance produce manager at the Tunkhannock store, Sands testified Zuba talked about unions at the meeting, and made reference to the fact that other area stores like Acme and Giant which were unionized had closed. She also recalled hearing Cahill ask a question on welfare, and heard Zuba respond, "If you feel that way, you can go on welfare." She further stated that she "thinks" someone else might have asked a question but could not recall who it was or what was asked. Through a series of leading questions put to her by Attorney Lewis, Sands, with simple "yes" or "no" responses denied that Zuba told employees the Tunkhannock store would close if the Union came in, telling them what would happen if the Union organized the store, saying it would do employees no good to select the Union as their representative because it could do nothing for them, saying that Weis would never have a union and would close the store,

³⁶ Adamsky's willingness to volunteer information before even being asked a question is indicative of an attempt by him to tailor his testimony to support the Respondent's case. *Best Western Motor Inn*, 281 NLRB 203, 207 (1986).

or telling them that the Tunkhannock store would not expand if the Union came in. On cross-examination, she recalled Zuba saying that just because “you’re union don’t mean you have job security.” She further admitted she had difficulty recalling much of the meeting (Tr. 754–757; 760–761).

Dymond: The last of the Respondent’s witnesses regarding the morning meeting, Dymond, the Tunkhannock store’s bakery manager, had absolutely no independent recollection of what transpired at that meeting. As he did with Sands, Metz, and several other witnesses, Respondent’s counsel, through a series of leading and suggestive questions, solicited negative responses from Dymond to questions on whether Zuba made threats to close the store if it were unionized, whether he said the store would close if the Union came in, whether he mentioned that the Tunkhannock store would never have a union because Weis would close the store, and whether he told employees it would do them no good to select the Union as bargaining agent because it could do nothing for them. She further denied Zuba told employees that if the Union came into any of Mr. Z’s stores, they would close and everyone would be out of a job. Indeed, the only thing she recalled without any prompting from Respondent’s counsel was Cahill’s welfare query to Zuba, and the latter’s reply that “he wasn’t the person to ask because he didn’t know the answer.” Dymond, however, claims that Cahill asked Zuba another question about welfare, and that Zuba responded by telling him if he thought people on welfare make more money, he (Cahill) was free to go on welfare.

(b) *The January 23, afternoon meeting*

At approximately 4 p.m. on January 23, Zuba held another mandatory meeting at the Tunkhannock store, presumably for those employees who did not attend the morning meeting. As with the morning meeting, the subject matter pertained to the Union and Zuba claims he followed basically the same script as previously testified to by him. However, Zuba claims that during the afternoon meeting, an employee asked him about the status of employee raises, and that he responded he had already submitted a request for raises to Weis, and that the request was made either on January 19 or 20, in accordance with past practice. Davis also attended this meeting. He testified to hearing Zuba tell employees he was recommending to Weis that employees be given a raise, and admit that he should not be telling them about the raise. Davis testified that employees usually got raises once a year, but that Zuba had to first put in for such raise. Dudek also attended this particular meeting, but testified that he could only remember bits and pieces of what Zuba said. In fact, he claims that for the most part he recalled that Zuba talked about wages. When asked by Respondent’s counsel what Zuba said about wages, Dudek responded, “Well, he said he was just going to try to get us a raise.” In response to a leading question, Dudek modified his response by claiming that Zuba told them he had put in a wage request for employees. Judy Saylor, an assistant manager at the Tunkhannock store bakery department also attended the meeting and heard Zuba remark that he “was putting in for a raise for everybody,” but did not hear him say who he had addressed the raise to.

Saylor recalled that the comment about the raise was in response to a question which she says came “out of the blue.”

Credibility Resolutions

Regarding the January 23 Meetings

As noted, there is a clear discrepancy between the General Counsel’s and the Respondent’s witnesses as to what Zuba said or did not say during the morning meeting, with the former asserting that certain threats were made, and latter denying the same. From a demeanor standpoint, I was more impressed by the testimony of the General Counsel’s witnesses and am convinced they testified in an honest and forthright manner. Their testimony was more spontaneous and detailed, and, unlike the Respondent’s witnesses, not elicited through leading questions. Further, two of them, Burroughs and Miller, were still employed by the Respondent as of the date of the hearing, entitling their testimony to greater weight, *Sam’s Club*, 322 NLRB 8 (1996); *Van Vlerah Mechanical*, 320 NLRB 739, 744 at fn. 8 (1996), and Bonavita, who, as noted, had voluntarily left the Respondent’s employ by the time of the hearing, was a disinterested witness with nothing to gain from the outcome of this hearing, making her testimony that more reliable.³⁷

The Respondent’s witnesses, on the other hand, were not very convincing and, at times, provided conflicting testimony. Thus, Davis’ testimony, for example, that the meeting was intended as a morale booster rather than a discussion on the Union is clearly at odds with Zuba’s admission that the meeting was intended to give employees Respondent’s side of the story regarding unionization, conflicts with Rinaldi’s claim that the focus of the meeting was to discuss the Union’s ability to protect employee jobs, and was implicitly disputed by Metz who testified that Zuba began the meeting by advising employees that the Union had begun an organizing campaign. Davis also initially denied that Zuba told employees that Weis did not want a union in the store. However, when confronted with his own affidavit, Davis was forced to concede that Zuba had indeed made such a remark to employees. Further, except for Swick who testified he could not “recall” whether Zuba made any threatening remarks, all of the Respondent’s witnesses denied hearing the threatening remarks attributed to Zuba by the General Counsel’s witnesses. These denials, which for the most part were simple “yes” or “no” answers to a series of very suggestive, leading questions posed to them by Respondent’s counsel, often without so much as a pretense that the witness’

³⁷ I find no basis for drawing an adverse inference from the fact that Cahill and Miller, who testified to having taken notes at the January 23, morning meeting, discarded the notes shortly thereafter, as the Respondent has requested I do (R. Br. 60, fn. 33). *MK Railway Corp.*, 319 NLRB 337, 341 (1995), relied on by Respondent to support such an adverse inference is factually distinguishable. Thus, in *MK Railway*, unlike here, there was no evidence to indicate that the notes in question no longer existed. Further, unlike the witness in *MK Railway*, who relied on his recollection of what was contained in the missing notes to furnish testimony, Cahill and Miller here provided testimony based on what they remembered of the January 23, meeting, and were not relying on what they may have recorded in their notes. Accordingly, Respondent’s reliance on *MK Railway* as a basis for having me discredit either Cahill or Miller is misplaced and without merit.

independent recollection of events had been exhausted, are in my view entitled to little or no weight. *Laser Tool, Inc.*, 320 NLRB 105, 109 (1995) ("The essential bare denial that events occur or that any specific statements were made is not a persuasive or helpful aid to an evaluation of credibility"). Overall, the testimony of Respondent's witnesses was not persuasive and to the extent it disagrees with that of the General Counsel's witnesses is not credited.

Analysis

I. ZUBA'S STORE CLOSING, JOB LOSS, AND FUTILITY OF SELECTING A UNION REMARKS

The standard for determining the legality of Zuba's comments was set by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The Court (at 618) stated:

[A]n employer is free to communicate to his employees any of his general views about unionization or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionism will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to the demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.

The credited testimony of the General Counsel's witnesses establishes that Zuba implicitly told employees it would be futile to select the Union as their bargaining representative because it could do nothing for them, and further warned that if they selected the Union to represent them Respondent would close the store and employees would lose their jobs. I do not doubt that Zuba also made reference to the fact that other unionized stores in the area had closed, and that he may have done so partially in response to what he claims was the Union's promise of job security contained in the literature distributed to employees. If Zuba had limited his remarks to simply pointing out the effect unionization has had on other area stores, I would have no difficulty finding his comments to have been protected under Section 8(c). *Blue Grass Industries*, 287 NLRB 274, 275 (1987). However, Zuba did not restrict his remarks to what had happened at other stores, but instead proceeded to threaten that his own store would close and jobs would be lost if the Union were brought in. Nothing in his latter comments suggest that Zuba intended his store closing remark as a mere prediction, based on objective factors, of the likely economic consequences beyond the Respondent's control the Union would have on its operations. Even assuming, arguendo, that Zuba may have had a good faith belief (which I sincerely doubt) that unionization will or may result in store closings, the expression of his views was hardly a statement of fact based on objective evidence. In short, Zuba's threat to close the store was made contingent on the success or failure of the Union's organizational campaign, not on economic necessities. The message to employees at this particular meeting was quite clear: support the Union and risk losing your jobs. In these cir-

cumstances, Zuba's threat to close the store and put employees out of work, and that the Union could do nothing for them, exceeded the bounds of permissible conduct under Section 8(c), and violated Section 8(a)(1) of the Act, as alleged. See *Farris Fashions*, 312 NLRB 547, 556-557 (1993).

II. COMMENTS REGARDING EXPANSION OF TUNKHANNOCK STORE

It is also alleged that Zuba unlawfully threatened not to expand the Tunkhannock store if the Union came in. The evidence relied on by the General Counsel consists of Cahill's testimony that he heard Zuba make such a remark. Zuba's testimony reflects that he discussed expansion of the stores, but only in a broad and positive sense (e.g., "we can expand our operations") and not in the specific manner described by Cahill. Cahill's testimony in this regard was not corroborated by any other witness. While I believe Cahill may have heard Zuba make a reference to the expansion of the stores, I am not persuaded, particularly given the lack of corroboration, that Cahill actually heard Zuba mention he would not expand the Tunkhannock store. Rather, I believe Cahill simply misinterpreted what Zuba was saying on the question of expansion. As there is insufficient credible evidence to support this allegation, it shall be dismissed.³⁸

III. ENCOURAGING AN EMPLOYEE TO QUIT HIS EMPLOYMENT

The General Counsel further alleges that Zuba's comment to Cahill, that he should go on welfare, was also unlawful and violative of Section 8(a)(1). I disagree. Initially, there is no disputing that such an exchange occurred, for witnesses on both sides testified to hearing, in one form or another, Cahill ask why persons on welfare could make more money than employees working for Mr. Z's, and Zuba respond that if Cahill believed that he should quit and go on welfare. The evidence, however, fails to establish that Zuba knew or had reason to suspect that Cahill was somehow involved with the Union when this exchange occurred. Indeed, the earliest such knowledge can be attributed to Zuba was immediately after the meeting, when Zuba observed Cahill outside the store talking to Chincola while the latter distributed Union literature to employees. The General Counsel contends that knowledge of Cahill's support for the Union can be imputed to Zuba because the views expressed by the latter regarding low employee wages purportedly echo the position set forth in the union literature sent to employees' homes. Clearly, any employee in attendance at the meeting, whether or not predisposed to the Union, may have had a similar concern about the alleged state of Respondent's low wages. To assume, therefore, as the General Counsel would have me do, that Zuba could have known or suspected from a simple query regarding employee wages that the employee asking the question was somehow involved with the Union would, in my view, be unreasonable and highly speculative, and would constitute too slender a thread on which base a finding

³⁸ My finding in this regard in no way diminishes Cahill's overall trustworthiness and reliability as a witness, for nothing is more common than for a trier of fact to believe some, but not all, of a witness' testimony. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

of a violation. Accordingly, I find that Zuba's response did not contravene any provision of the Act.³⁹

IV. PROMISE OF A WAGE INCREASE

Finally, it is alleged that during the January 23, afternoon meeting, Zuba unlawfully promised employees a wage increase to induce them into rejecting the Union. I find merit in this allegation. There is no question that Zuba told employees that he was putting in for a raise, for Zuba readily admits having said so, a fact confirmed by Davis, Dudek, and Saylor. However, Zuba's claim that a request for yearly raises was submitted every year around January 19 or 20, was unsubstantiated by oral or documentary evidence. Davis, who testified that employees received yearly raises and that Zuba often had to put in for them, did not state when such a request was normally made. Consequently, assuming that employees received yearly raises, the only evidence as to their timing was Zuba's unsubstantiated claim that such requests were normally submitted on or about January 19 or 20. Clearly, one would expect that Respondent would have some documentation to support Zuba's above claim. In fact, Zuba's testimony that he had put in a similar request in writing to a Mr. Richard Ready for the upcoming year makes clear that if such a request had been made on or about January 19 or 20, it would have been memorialized in writing (Tr. 1046). Thus, Respondent's failure to produce such documentation convinces me that none exists. *Eddyleon Chocolate Co.*, 301 NLRB 878,898 (1991). In the absence of such corroboration, I give no credence to Zuba's claim that he had an established practice of submitting requests for employee raises on January 19 or 20 of every year.

Nor am I convinced that Zuba in fact submitted such a request on January 19 or 20, just prior to the January 23, meeting, as claimed by Respondent. Davis, for example, did not state that such a request had been made, and testified only that Zuba told employees "he was trying to get them a raise." His further testimony that "we usually get them like maybe once a year" is somewhat ambiguous and could be read to mean that either requests for raises are not made every year, or that the actual raises are not approved every year (Tr. 262). Dudek, who admitted to having a poor recollection of what was said at that particular meeting, initially testified that Zuba told employees "he was just going to try to get us a raise," and made no mention of hearing Zuba state that such a request had already been made. Only when Respondent's counsel prompted him by asking him, "He put in a wage request to Weis Markets?" did Dudek respond, "Right." (Tr. 888.) I place no credence on Dudek's latter response. Likewise, Saylor's testimony, that Zuba told employees "he was putting in for a raise for everybody," gives no indication that Zuba had already done so and, if anything, suggests some future, rather than past, conduct on his part (Tr. 282). Nor does the evidence persuade me that Zuba's

discussion of the wage increase came in response to an employee question. Neither Dudek nor Davis testified that Zuba was responding to a question and make no claim to having heard any question being asked. Saylor initially testified that Zuba "just commented" on the raise question, but subsequently added, "I think somebody asked him. That was it. He didn't . . . it didn't have anything to do with the conversation, somebody asked." Indeed, her further testimony suggests that Zuba's mention of the wage increase came in response to a totally unrelated question posed to him by an employee. Thus, while she could not recall what question was asked by the employee, she claims that "this thing about raises comes out of the blue and in response to a question by an employee." Saylor's testimony as to how the topic of the wage increase was raised is in my view too confusing and ambiguous to be reliable. Accordingly, I give it no weight.

In summary, the Respondent has not demonstrated that Zuba's January 23, promise of a wage increase for employees was consistent with any established past practice. As was noted by the Supreme Court in *NLRB v. Exchange Parts*, 375 U.S. 405 (1964):

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside a velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

Here, Zuba's promise of a wage increase during the afternoon meeting followed a morning meeting during which a concern over the purportedly low wages by Respondent was raised by at least one employee, Cahill, at the end of that meeting. Clearly, Zuba's rather acerbic response to Cahill's query regarding wages, that he should go on welfare, corroborated by witnesses on both sides, could hardly have been the answer Cahill or, for that matter, other employees in attendance expected or indeed wanted to hear. While I have no way of knowing what went through Zuba's mind following this exchange, given Zuba's concern that his stores might become unionized, and his opposition thereto as evident from his threats to close the store and put people out of work if the Union came in, it would not be unreasonable to believe that Zuba may have concluded his welfare comment to Cahill did not go over well with employees and might, if anything, encourage rather than dissuade employees from supporting the Union. Absent any credible evidence of a past practice as to the timing or grant of yearly wage increases, or to show that Zuba had indeed put in for such a raise on or about January 19 or 20, I find that Zuba's promise of a wage increase during the January 23, afternoon meeting may have been designed to remedy any harm his morning comments may have done to his antiunion message, and was intended as an inducement to discourage employees from supporting the Union. Accordingly, the Respondent's promise of a wage increase was unlawful and violative of Section 8(a)(1).

³⁹ *Stoody Co.*, 312 NLRB 1175 (1993); *McDonald's Land & Mining Co.*, 301 NLRB 463 (1991); and *House Calls, Inc.*, 304 NLRB 311 (1991), cited in the General Counsel's posthearing brief (p. 42), are factually distinguishable in that, unlike here, the employer's remarks in those cases were made with knowledge that the employee to whom they were directed was a union supporter or was otherwise engaged in protected concerted activity.

V. TELLING UNION ORGANIZERS NOT TO BOTHER
AN EMPLOYEE

The General Counsel alleges that Respondent violated Section 8(a)(1) when Zuba told Chincola and the organizers not to bother Cahill. Zuba, as noted, admits having so instructed the organizers. It is not totally clear whether his comment was made before or after he asked Cahill if the organizers were bothering him. In any event, the order in which the remarks were made is of no consequence. What is significant, however, is that Zuba must have known that Chincola and the others were union representatives given that they were openly distributing union literature to other employees. Nothing in his testimony suggests otherwise. In fact, Zuba made no effort to ask who they were or whether Cahill knew them, nor indeed did he have a right to do so, as the organizers were not on Respondent's property and Cahill, who was off work at the time, was free to talk to whomever he pleased. Rather, Zuba's abrupt intrusion into the Cahill/-Chincola conversation to inquire if Cahill was being bothered by the organizers and to direct Chincola not to bother him, followed immediately thereafter by his unlawful attempt to eject the organizers from the property, was clearly an attempt by Zuba to keep the Union from conveying its message to employees and from having the latter learn more about the Union, and further interfered with Cahill's right to freely talk to and associate with Union organizers on his own time. Accordingly, I find, in agreement with the General Counsel, that Zuba's remarks violated Section 8(a)(1) of the Act.

(c) *The threat to reduce employees' work hours*

The complaint alleges that on January 27, the Respondent unlawfully threatened to reduce employees' work hours because of their union activity. This allegation, as noted, is based on testimony from Miller, who claims to have heard Kern say that "if we didn't start working harder, he was going to hire more people and cut our hours," and on Cahill's testimony that he heard Kern remark aloud to Adamsky, "If this crap doesn't stop, we're going to cut the hours and bring in our own guys." It is patently clear, first of all, that Cahill and Miller were describing different incidents. Cahill, for example, states that Kern made his remark during a conversation between Kern and Adamsky in the "juice" aisle, and that while Miller was nearby he did not hear Kern's remark. Miller, on the other hand, overheard Kern's remark presumably during Kern's meeting with employees in which he discussed both the condition of the store and the shortage of checkers. Miller, as noted, could not recall if Cahill was at the meeting. While there is no question that Kern at some point stated that "this crap has to stop," I am convinced that his comments in this regard related to what he perceived was the night shift's inability to work harder to ensure that the store maintained an orderly appearance and that shelves were properly stocked. Although Miller testified that on the morning when Kern found the store in disarray the new freight had been shelved, he admits that employees were still working on shelving the old freight that was in the storeroom, raising the likelihood that Kern's dissatisfaction was directed at the employees' failure to have completed the job of shelving the old freight. Further, although Miller did not testify to hearing Kern discuss other matters at this meeting, such as the shortage of checkers on

the night shift, his failure to do so was due to the fact none of the parties saw fit to ask him what else, if anything, Kern may have said, and not from any specific denial that Kern discussed the shortage of checkers. Thus, I credit Kern's account, which is undisputed, that at this meeting he discussed both the messy condition of the store and the need to obtain additional checkers.⁴⁰ Further, I have no doubt that Miller may have heard Kern say something to the effect that employees had to work harder and that hours would be cut. However, I am inclined to believe Kern's remarks in this regard were separately made in addressing the issues of the messy store and the checker shortage, and not as the combined statement purportedly heard by Miller. Thus, I find that Miller simply misheard what Kern actually said. Miller, as noted, was not sure if Cahill was present at this meeting, and Cahill was not questioned on whether he attended any such meeting. Cahill, as noted, also claims to have heard at some other time Kern make his "crap" remark. Again, I am convinced that to the extent such a remark was overheard by Cahill, it reflected Kern's ongoing concern about the condition of the store and the shortage of checkers. I am, in any event, somewhat skeptical as to Cahill's testimony in this regard. His claim, for example, that Miller was standing nearby but did not hear Kern make the remark is difficult to accept, as he could have no way of knowing what, if anything, Miller might have heard. Miller, on the other hand, was not asked to corroborate Cahill's account. Given these facts, I find the evidence insufficient to support the allegation that Kern threatened to reduce employees' work hours because of their support for the Union, and shall, accordingly, recommend dismissal of this allegation.

(d) *The union button incident*

The complaint, as noted, alleges that the Respondent violated Section 8(a)(1) when Davis directed Cahill to remove the union button he was wearing. While not denying the allegation, the Respondent contends that any violation that may have occurred from this incident was effectively cured when Cahill was allowed to continue wearing the button without incident, citing *Atlantic Forest Products*, 282 NLRB 855 (1987). Generally speaking, the wearing of union insignia to work is a right protected by Section 7 of the Act and unless an employer can show the existence of "special considerations" justifying a restriction on that right, the interference therewith will be found to be unlawful. *Albertson's, Inc.*, 319 NLRB 93, 103 (1995). As no such argument or showing has been made here by the Respondent, Davis' conduct in asking Cahill to remove the button is found to be violative of Section 8(a)(1). The Respondent's reliance on *Atlantic Forest Products* to show that the violation was effectively cured is without merit. In the instant case, unlike in *Atlantic Forest Products*, where the restriction on the wearing of union buttons was removed soon after employees were told they could not wear such buttons, e.g., within 30 minutes to 2-3 hours later, Cahill was not allowed to wear the button until the following day, presumably after Davis had consulted on the

⁴⁰ Kern testified, credibly and without contradiction, that following his meeting, Miller and employee Richard Colinowski volunteered to train as checkers or cashiers (Tr. 812). Miller's description of his duties as a "stock person, deli, cashier" supports Kern's testimony in this regard.

matter with Respondent's counsel. Further, despite being allowed to wear the button the next day, Cahill was again approached by Assistant Manager Dudek and told to remove the button. Dudek's behavior in asking Cahill to remove the button after Davis had authorized Cahill to wear it makes clear that Respondent made no effort to communicate to supervisors that employees were free to engage in such conduct and in all likelihood, with the exception of Cahill, did not notify employees of their right to do so without interference. Given these facts, I cannot find that the Respondent's repudiation was unambiguous, done in a timely fashion, or effectively communicated to employees. Accordingly, I find that the alleged repudiation does not meet the criteria set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). See *Comcast Cablevision*, 313 NLRB 220, 253 (1993).

B. The 8(a)(3) and (4) Allegations

1. Cahill's discharge

The General Counsel contends that Cahill was discharged on April 29, because of his Union activities and for having given an affidavit to the Board in support of the charges filed by the Union in this matter. The Respondent denies the allegations, claiming Cahill was lawfully discharged for having threatened his supervisor Adamsky.

Under *Wright Line*, 251 NLRB 1083 (1980),⁴¹ the General Counsel has the burden of establishing a prima facie case that is sufficient to support the inference that protected conduct was a motivating factor in an employer's decision to discipline or discharge an employee. To do so, the General Counsel must show that the affected employee was engaged in union activities, that the employer had knowledge of such activities, and that it harbored antiunion animus. Once this is established, the burden shifts to the employer to demonstrate that the action taken against the employee would have occurred even in the absence of protected conduct. If the employer's explanations for its actions are found to be pretextual—that is, they either do not exist or were not in fact relied upon—the employer will not have met its burden and the inquiry is logically at an end. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf. 705 F.2d 799 (6th Cir. 1982).

The credible evidence of record reveals that the General Counsel has made a strong prima facie showing that Cahill's discharge was motivated by antiunion considerations. Cahill was the prime mover behind the Union's attempt to organize Respondent's employees, having first made contact with the Union in November 1994 at which time he signed an authorization card. Thereafter, he solicited other employees to do the same. Cahill also was responsible for notifying the Union about the January 23 meetings which led to the leafleting by union organizers in front of Respondent's stores, and further openly displayed his pronoun stance by wearing a Union button to work. It is also undisputed that Respondent was fully aware of Cahill's involvement with the Union before discharging him on April 28. Thus, both Davis and Brown admit knowing as early as January 23, of his activities, and both Kern and Adamsky sometime in January began refer-

ring to Cahill as either "Mr. Union" or "Union boy." Further, Davis and Dudek both saw Cahill wearing his union button within a month prior to his discharge. Finally, Zuba's threat to close the store and that employees would lose their jobs if the Union were brought in, and his suggestion that it would be futile for employees to select the Union as their bargaining agent, provides clear evidence of Respondent's antiunion animus. Given the above, I find that the General Counsel has satisfied his initial *Wright Line* burden of proof. The burden now shifts to the Respondent to demonstrate that Cahill would have been discharged on April 29, even if he had not engaged in any union activity.

The Respondent defense rests for the most part on a claim that Brown's decision to discharge Cahill was made following Brown's investigation of Adamsky's claim that Cahill had threatened him with a car bomb, and on Brown's good faith belief that Cahill had indeed threatened Adamsky. Initially, a determination needs to be made on whether or not Cahill in fact threatened Adamsky on March 29. While there is clearly a difference in the versions of the March 29 incident provided by Adamsky on the one hand, and Cahill and Burroughs on the other, I find that even if I were to accept Adamsky's version as accurate, which I do not, the evidence would not support a finding that a threat was made. Adamsky's version reflects only that while looking at him (Adamsky) in a mad way, Cahill told Burroughs that he and his brother had gotten a book on how to make car bombs and described what happens to the body after such a bomb goes off. According to Adamsky, he then asked Cahill if the latter was threatening him, and asserts that Cahill simply walked away without saying anything. Thus, by Adamsky's own account, there was no threat made. Adamsky's claim that he took Cahill's remarks to Burroughs as a personal threat to him is premised not on any particular words directed at him by Cahill but rather on his claim that Cahill gave him a "mad look" (subsequently recharacterized by Adamsky as "upset," "annoyed," "a grimace," and "a frown") when he made his remarks. It is patently clear therefore from Adamsky's own testimony that Cahill never actually threatened him and that the latter simply assumed it to be so from his rather dubious interpretation of Cahill's facial expression (Tr. 315; 317).

Adamsky, in any event, was not a credible witness. His overall demeanor was poor and his account of what transpired on March 29, confusing and contradictory. He was at times evasive, as when he was asked about Cahill's overall job performance (Tr. 307),⁴² and feigned an inability to understand the fairly straightforward and simple questions posed to him by the General Counsel (Tr. 1012). While Davis may have been told by Adamsky about what occurred on March 29, Adamsky's claim that he reported the incident first to Kern and subsequently to Balian was not corroborated by Kern, who as noted, testified at the hearing, or by Balian, who was not called as a witness. Nor was there any

⁴¹ Enf. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

⁴² Although Adamsky sought to portray Cahill as a less than satisfactory worker (Tr. 307), the only two evaluations prepared on him during the first several months of his employment show that Cahill was a satisfactory worker. Further, there is no evidence to indicate that prior to his discharge Cahill had ever had problems at the workplace or been disciplined or warned for misconduct. Adamsky's attempt to portray Cahill as a poor employee detracts further from his overall credibility.

corroboration of many of the subsequent incidents of threats and harassment which Adamsky claims were directed at him following Cahill's discharge, leading me to further doubt whether these incidents actually occurred or were simply a figment of what I am inclined to believe was Adamsky's overly active and possibly paranoid imagination. In contrast, Cahill and Burroughs came across as sincere, honest, and straightforward witnesses. While Cahill clearly had an interest in the outcome of this proceeding which might tend to color his testimony, I believe, especially in view of Burroughs' corroborative testimony,⁴³ that Cahill provided an accurate and truthful account of the March 29, incident. Thus, while I am inclined to believe Adamsky may have overheard Cahill's "car bomb" conversation with Burroughs, his assertion that Cahill was staring at him when he made his remarks has been credibly denied by Cahill and is rejected. Assuming *arguendo* that Adamsky honestly felt threatened by what he overheard Cahill and Burroughs discussing, such fears clearly were not based on any words or conduct directed at him by Cahill but was, as suggested above, the product of an overactive imagination.

Thus, when Brown discharged Cahill on April 29, he did so based on alleged misconduct by Cahill that did not occur. The Respondent, however, suggests that because Brown honestly believed, based on his investigation, that the threat was in fact made, the discharge cannot be found to have violated the Act. I disagree. First, Brown's own testimony indicates that he was never told of an actual threat having been made by Cahill, only that Adamsky perceived one had occurred. Thus, when asked what he had been told, Brown testified that Adamsky "had said that [Cahill] had a book on making car bombs, and Mr. Adamsky took that as a threat." (Tr. 537.) According to Brown, at the management meeting held on April 27, Cahill's alleged threat, along with other incidents that had occurred at the store, was discussed and on Attorney Lewis' advice, Brown agreed that he and Lewis would meet with Adamsky to confirm that the alleged threat had been made. Brown testified he had previously discussed the incident with Adamsky but wanted to confirm it one more time. If confirmed, Brown then would confront Cahill and his discharge would be effectuated if Brown were convinced that the incident in fact occurred.

There are two problems with Brown's testimony in this regard which cause me doubt his overall veracity. Initially, Adamsky makes no mention in his testimony of having discussed the incident with Brown prior to April 28. Thus, he testified only that he informed Kern, Davis, and Balian of Cahill's alleged remarks, and that he discussed the matter with Brown on April 28. Brown's claim that he had discussed the matter with Adamsky prior to April 28, and that he simply wanted to confirm the latter's story, is therefore at odds with Adamsky's testimony and is not credited (Tr. 545; 996). More importantly, Brown's claim that he waited to make his inquires from Adamsky and Cahill before deciding to discharge Cahill is contradicted by Rakoskie, whose testimony strongly suggests that the discharge decision had

already been made on April 27, before Brown even met with Adamsky or Cahill, and that the decision was based not only the alleged threat but on other unrelated matters as well. Thus, testifying as to what occurred at the April 27, meeting, Rakoskie stated that he "participated in the decision to terminate Mr. Cahill," and that it was a "consensus decision . . . based on the threats to the store, threats to the supervisor, and the incidents at the store." (Tr. 329.)⁴⁴ Given Brown's inconsistencies, I credit Rakoskie and find that the decision to discharge Cahill was in fact made at the April 27, management meeting, and that the subsequent interview of Adamsky and Cahill was simply a charade aimed at lending an air of legitimacy to an otherwise unlawful discharge.

But even if I were to credit Brown's assertion that Cahill was discharged on April 29, after being interviewed by Brown, the result would be the same inasmuch as neither Adamsky's or Cahill's version of what occurred establishes that a threat was made. In fact, all evidence relating to this incident support a finding that Cahill's discharge for allegedly threatening Adamsky was simply a pretext used by Respondent to rid itself of the Union's leading adherent. Brown, for example, never bothered to interview Burroughs, the only other person present during the March 29, incident. Further, despite the alleged seriousness of the threat, no action was taken against Cahill until 1 month later, during which time Cahill and Adamsky worked side by side. If, as Adamsky claims, he had this overwhelming fear for his life stemming from the threat, it is highly unlikely that he would have wanted to, or been allowed to, work together with Cahill. Clearly, Cahill could have been transferred to another shift, or store, for that matter pending further review of the incident. Respondent's willingness to allow the matter to sit for a month until its labor counsel, Lewis, returned from a purported vacation simply strains credulity. Finally, the inclusion of the March 29, incident in Respondent's "Union Activity" log, suggests to me that Respondent intended to use this incident as a pretext to discharge Cahill. In summary, I find that the asserted reason for discharging Cahill was pretextual, that Respondent in fact discharged him because of his union activities, and that in doing so, the Respondent violated Section 8(a)(3) and (1) of the Act, as alleged. *Beaird Industries*, 311 NLRB 768 (769); *Gamewell Mfg.*, 291 NLRB 702, 705 (1988).⁴⁵

There remains the allegation that the discharge also violated Section 8(a)(4) and (1) of the Act. I find no evidence to support this particular allegation. The General Counsel readily concedes that there is no explicit evidence to establish that Respondent knew that Cahill was assisting in the

⁴³ Burroughs, as noted, was still employed by Respondent at the time of the hearing and has no discernible interest in the outcome of this proceeding. These factors obviously enhance his overall credibility. *Van Vlerah Mechanical*, 320 NLRB 739, 744 at fn. 8 (1996); *Stanford Realty Associates*, 306 NLRB 1061, 1064 (1992).

⁴⁴ Interestingly, Respondent's counsel cut Rakoskie off in mid-sentence before the latter could finish what he had to say. I am convinced attorney Lewis cut him off intentionally as Rakoskie's testimony was clearly pointing to the fact that the discharge decision was made before the matter had been fully investigated or even discussed with Cahill, and in this regard contradicted Brown's assertion that the decision to discharge Cahill was made on April 29, following his investigation of the incident.

⁴⁵ The cases cited by Respondent, e.g., *Evans St. Clair, Inc.*, 278 NLRB 459 (1986); *Power, Inc.*, 311 NLRB 599 (1993); *Tri-City Fabricating & Welding Co.*, 316 NLRB 1096 (1995), are factually distinguishable from the instant case. In those cases, unlike here, there was evidence of actual threats having been made justifying the discharges of the employees in question.

Board's investigation of the charges filed by the Union through the submission of affidavits. He claims, however, that the fact that Respondent created a "Union Activity" log in response to the charges filed, and that the log was relied on to support the discharge, creates a logical nexus between the filing of the charges and Cahill's discharge, sufficient to support a finding of a 8(a)(4) and (1) violation. Such an argument is tenuous at best, and, in my view, insufficient to warrant an inference that Respondent acted against Cahill because it somehow knew or suspected he had assisted in the Board's investigation of the charges filed by the Union. Accordingly, I shall recommend dismissal of this allegation.

2. The filing of criminal charges against Cahill

The General Counsel alleges, and I agree, that the Respondent further violated Section 8(a)(3) and (1) by causing criminal charges to be filed against Cahill in retaliation for his union activities. The Respondent's defense to this allegation is twofold: (1) while a report was made to the state police regarding Cahill's threat, no actual complaint was ever filed; (2) Adamsky and Respondent were lawfully entitled to report Cahill's threats based on a good-faith belief that Cahill had committed a crime. Both arguments are without merit. As to the former, the Respondent relies exclusively on testimony from Poltruck, who is employed by Weis as director of security and is a former Pennsylvania state police officer, that only a report was filed, not a complaint. He testified that a report formally becomes a complaint only after it has been investigated by the state police and a determination made that a crime may have been committed.⁴⁶ Poltruck's testimony as to whether or not a complaint was filed was disputed by State Trooper Filarsky who testified that while labeled an "incident report" the writeup prepared by trooper Jordan in fact constitutes a complaint. I credit Filarsky's testimony that a complaint was indeed filed. In this regard I note that as an active duty state police officer, Filarsky would have had greater familiarity with current police policy, procedure and terminology than Poltruck, who last worked for the state police in 1991. Further, unlike Poltruck, who because of his continued employment with Respondent would have been partial to its position, Filarsky, who testified under subpoena, was an unbiased witness lacking any predisposition for one side or the other. Accordingly, Respondent's claim that no complaint was filed against Cahill is rejected.

Respondent's good-faith defense is equally without merit.⁴⁷ Under Board law, an employer's filing of a criminal

complaint will violate Section 8(a)(1) if the complaint lacks a reasonable basis in law and fact, and had a retaliatory motive. See *Johnson & Hardin Co.*, supra at 691, relying on *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). If a criminal complaint is found to be without merit, the "reasonable basis in law and fact" prong of this test will be deemed to have been met. *Control Services*, 315 NLRB 431, 455 (1994). Here, the criminal complaint filed by Respondent against Cahill was fully investigated by the Pennsylvania state police and dismissed because, according to investigating officer Filarsky, it was found to be "groundless." While the finding that the complaint was without merit came at the conclusion of the investigative stage, rather than at the end of a state court proceeding, the state police determination was tantamount to a final adjudication of the issue. As the complaint was therefore found to be without merit, I find that it lacked a reasonable basis in law and fact.

There is also no question in my mind that the complaint was retaliatory in nature. Indicators of a retaliatory motive include, inter alia, threats that may have been made, as well as the demeanor and credibility of witnesses. *Control Services*, supra at 456. Here, the credible evidence establishes that Adamsky was never threatened by Cahill on March 29, and in fact was not even a participant in the latter's discussion with Burroughs. Indeed, Adamsky's own testimony indicates that he was never actually threatened, and that he only perceived such to be the case. Moreover, Brown's own testimony indicates that Adamsky never told him Cahill had threatened him. At a minimum, Adamsky's description of the incident to Brown, which does not make reference to a threat having been made, and Cahill's denial to Brown that he ever threatened Adamsky, should have caused Brown to inquire further into the matter, such as by interviewing Burroughs, the only other witness to the March 29 incident. His failure to do so convinces me that he had no interest in ascertaining the truth of what occurred, and provides clear evidence of a lack of good faith in instituting the criminal charges against him. Further, I have no doubt that Respondent believed Cahill may have been responsible for the Union's organizational efforts at its stores. During the January 23 meeting, Cahill, as noted, expressed his feelings about the low state of employee wages to Zuba and while, as found above, Zuba was unaware at the time of his exchange with Cahill of the latter's involvement with the Union, that fact soon changed immediately after the meeting when Zuba observed Cahill talking to the union organizers in front of the Tunkhannock store. I am convinced that Zuba put two and two together and equated Cahill's outspokenness during the meeting with union activism. Further, Cahill's decision to wear a Union button to work, and his resistance to having to remove it when asked to do so by Davis, clearly must have convinced Respondent that Cahill was not a mere passive union supporter, and may in fact have played a role in the Union's efforts to organize its stores. As found above, the Respondent was certainly not shy in summoning the police to evict

⁴⁶ He testified that while a private individual may file a complaint, the latter would first have to file an affidavit with the district attorney. If approved, the matter is submitted to a local magistrate after which a criminal complaint is filed and a summons issued. Poltruck stated said procedure was not followed in this case.

⁴⁷ It does not appear that Respondent is disavowing responsibility for the filing of the complaint. Thus, when referring to the complaint, the Respondent in its posthearing brief frequently makes reference to how it and Adamsky were entitled to file such a complaint. Thus, at 74 of its brief, the Respondent states, "Adamsky and Respondent were lawfully entitled to report Cahill's threats" because "they had a good faith belief that he had committed a crime," and at 75 asserts that "at the time the incident was reported to the state police, Respondent was unaware of any determination by the law enforcement officials," and that it was therefore "not per se unlawful for Adamsky or Respondent to report the incident to the police." It

further claims that its conduct here is analogous to that of an employer in *Goldtex, Inc.*, 309 NLRB 158 (1991), again suggesting implicitly that it was responsible for the filing of the complaint against Cahill. Finally, Adamsky's claim that Brown told him he should file a complaint with the state police convinces me that Adamsky was simply complying with Respondent's request and that the latter, not Adamsky, was responsible for initiating the complaint process.

and/or arrest the organizers for engaging in lawful protected activity. When it filed the criminal complaint against Cahill, the Respondent was simply following the same pattern. Thus, the criminal charges resulted not from any threat made to Adamsky, which as found above was simply a pretext, but like the discharge itself was in retaliation for his activities on behalf of the Union. Accordingly, I find that by filing a criminal complaint against Cahill, the Respondent further violated Section 8(a)(3) and (1) of the Act. However, like the discharge, I find insufficient evidence to support a finding that filing of the criminal complaint also violated Section 8(a)(4) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling employees it would close its stores and employees would lose their jobs if they brought the Union in, telling them it would be futile to support the Union because it could do nothing for them, promising employees a wage increase to induce them into not supporting the Union, telling employees they could not wear union buttons to work, and prohibiting nonemployee organizers from distributing leaflets in front of its Tunkhannock, Plains, and Scranton stores on January 23 and 24, without having a property right in the premises entitling it legitimately to do so, and threatening to call, and in fact calling, the police to evict them, the Respondent violated Section 8(a)(1) of the Act.

4. By discharging Tom Cahill on April 28, for his Union activities, and thereafter filing a criminal complaint against him with the Pennsylvania state police in retaliation for such activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. The above unfair labor practices have the affect of burdening commerce within the meaning of Section 2(6) and (7) of the Act.

6. Except as specified herein, the Respondent has not engaged in any other unlawful conduct.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(3) and (1) by discharging Tom Cahill on April 28, I shall recommend that within 14 days of the Order,⁴⁸ Respondent offer him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of wages and benefits he may have suffered as a result of the unlawful discharge. Additionally, the Respondent shall be required to reimburse Cahill for any expenses he may have incurred responding to the criminal complaint filed against him, with interest. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons*

for the Retarded, 283 NLRB 1173 (1987). The Respondent shall also be required, within the above-described time period, to expunge from its files any and all reference to the unlawful discharge and to notify Cahill, in writing, that it has done so and that the discharge will not be used against him in any way. I shall also recommend that Respondent be ordered to petition the Pennsylvania state police to expunge from files any and all references to the criminal complaint filed against Cahill, and to notify Cahill in writing that it has done so.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁹

ORDER

The Respondent, Weis Markets, Inc. t/a Mr. Z's Food Mart, Tunkhannock, Plains, and Scranton, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to close its stores and to put employees out of work if they were to select United Food and Commercial Workers Local 72 as their bargaining representative, telling them it would be futile to select the Union to represent them because it could do nothing for them, trying to prevent employees from talking to Union organizers by telling the organizers not to bother employees, promising employees a wage increase in order to induce them into not supporting the Union, and prohibiting employees from wearing Union buttons to work.

(b) Prohibiting representatives of the Union from engaging in the distribution of literature on the sidewalk, parcel pickup, and parking lot areas adjacent to its Tunkhannock, Plains, and Scranton stores, and threatening them with arrest if they did not leave said areas, so long as such activity is conducted in a peaceful manner, is conducted by a reasonable number of persons, and does not unduly interfere with the normal use of the facilities or operation of businesses not associated with Respondent's stores.

(c) Discharging, filing a criminal complaint, or otherwise discriminating against Thomas Cahill or any other employee for supporting, or engaging in activities on behalf of, the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Thomas Cahill full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(b) Make Thomas Cahill whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

⁴⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴⁸ See *Indian Hills Care Center*, 321 NLRB 144 (1996).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Thomas Cahill on April 29, 1995, and petition the Pennsylvania state police to expunge from their files any reference to the unlawful criminal complaint filed against him, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its stores in Tunkhannock, Plains, and Scranton, Pennsylvania, copies of the attached notice marked "Appendix."⁵⁰ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the stores involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since February 16, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

⁵⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten that our stores will close and tell you that you will lose your jobs if you were to select United Food and Commercial Workers Local 72, or any other union, as your exclusive bargaining representative.

WE WILL NOT tell you that it would be futile to select the Union to represent you because it could nothing for you.

WE WILL NOT try to prevent you from engaging in discussions with union organizers by telling the organizers not to bother you,

WE WILL NOT promise you a wage increase in order to induce you into not supporting the Union, and

WE WILL NOT interfere with your right to wear Union buttons to work.

WE WILL NOT order representatives of United Food and Commercial Workers Local 72, who are engaged in peaceful handbilling protected by the Act to leave the sidewalk, parcel pickup, and parking lot areas adjacent to our stores located in Tunkhannock, Plains, and Scranton, Pennsylvania.

WE WILL NOT call the police to have the Union representatives removed that property, so long as the handbilling is conducted by a reasonable number of persons and does not unduly interfere with the normal use of the facilities or operation of businesses not associated with our stores.

WE WILL NOT discharge, file a criminal complaint, or otherwise discriminate against Thomas Cahill or any other employee because he supports or engages in activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Order, offer Thomas Cahill full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make Thomas Cahill whole for any loss of earnings and other benefits resulting from his unlawful discharge, less any net interim earnings, plus interest.

WE WILL reimburse him for any expenses he may have incurred, with interest, resulting from the criminal complaint unlawfully filed against him.

WE WILL, within 14 days from the date of the Order, remove from our files any reference to Thomas Cahill's discharge, and petition the Pennsylvania State Police to remove from its files any reference to the criminal complaint filed against him, and

WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WEIS MARKETS, INC. T/A MR. Z'S FOOD
MART